91-912

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH J. ULVIN, DORIS J. ANDERSON, LEO J. ANDERSON, MARJORIE L. BETTS, DONALD FEROE, WAYNE KEPLINGER and KATHERINE KOENIG,

Petitioners,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee who was fired and filed a timely charge of class-wide age discrimination with the Equal Employment Opportunity Commission, specifically alleging "a general pattern and practice of discrimination against individuals over the age of 40 years," and other employees, who were forced to retire by the same employer during the same time period as part of an overall reduction-in-force, are "similarly situated" under 29 U.S.C. § 626(b).

2. Whether persons who were given court-approved notice of this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and who sought to opt into the litigation, were impermissibly denied the right to rely upon a timely class-wide charge of age discrimination to satisfy the charge filing requirement of the Act.

LIST OF ALL PARTIES TO PROCEEDINGS PURSUANT TO RULE 29.1

The following parties were appellants below but are not participating in this proceeding:

Lloyd J. Anderson, William D. Barabas, Marlys Allen, Cora Ann Bird, Clinton A. Carlson, Earnestine Collins, Mary B. Devine, Roger Dixon, Helen Duffy, Elaine L. Flynn, Joyce L. French, Joseph H. Gruber, Pat M. Haugen, Mary Hightower, Delores Iverson, Leonard W. Jackson, Jr., Arthur Janota, Bonnie Johnson, Ronald A. Jones, Marilyn J. King, Otistine Koontzy, Thomas E. Lafond, Karla K. Larson, David N. Lawrence, Linda M. Levin a/k/a Linda Levin Thomas, Julie Lozano, Renee M. McCarthy, Joan M. Mirovsky, Linda J. Napier, Flordeliza V. Parayno, Noreine D. Philbin, John Richard Potasnak, Cynthia Rataj, Richard Regis, Carl W. Rettenmayer, David L. Roberts, Myron George Sandefur, James Thomas Scannell, Sharon Ruth Stewart, James T. Szczech, Kamal Tandon, Sheldon L. Thorkelson, Jessica Waukazo, James Stanley Welman, Steven G. Williams, Erdine L. Wolf, as personal representative for the estate of Karl Wolf, deceased, Karen Young.

Respondent Northwestern National Life Insurance is the only corporation involved in this proceeding, and has no parent or subsidiary company required to be listed under Rule 29.1.

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No.

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NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on September 30, 1991.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) has not been reported. The opinion of the district court (App., *infra*, 11a-23a) has not been reported.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on September 3, 1991. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1251(1). The

district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343 of the claims brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

STATUTES INVOLVED

A. The Age Discrimination in Employment Act

1. Section 4(a)(1) (29 U.S.C. § 623(a)(1)) provides in relevant part:

> It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

2. Section 7(b) (29 U.S.C. § 626(b)) provides in relevant part:

> The provisions of this chapter shall be enforced in acordance with the powers, remedies, and procedures provided in section[] . . . 216 . . . of this title . . . .

3. Section 7(d) (29 U.S.C. § 626(d)) provides in relevant part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> > (1) within 180 days after the alleged unlawful practice occurred . . . .

B. The Fair Labor Standards Act

Section 16(b) (29 U.S.C. § 216(b)) provides in relevant part:

> An action . . . may be maintained . . . by any one or more employees for and in behalf of himself or

> themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court which such action is brought. . .

STATEMENT

Petitioner Joseph J. Ulvin worked for Northwestern National Life Insurance Company ("NWNL") for over twenty years until he was fired on October 23, 1987, at the age of 46. Eighth Circuit Opinion, App., *infra*, 5a; District Court Complaint, App., *infra*, 28a. On March 31, 1988, Ulvin filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") alleging that NWNL had discriminated against him and fired him on the basis of age as part of a general pattern and practice of class-wide discrimination against all NWNL employees over forty years old. *Id.*, at 4a. Ulvin charged that his termination resulted from a discriminatory practice of demoting and "placing older employees into positions which would be eliminated by [NWNL]." Ulvin Charge, App., *infra*, 41a.

Ulvin's charge also notified NWNL that he was alleging class wide age discrimination:

> *STATEMENT OF CLASS WIDE DISCRIMINATION ON THE BASIS OF AGE:* I believe that Northwestern National Life Insurance Company's treatment of me is part of a general pattern and practice of discrimination against individuals over the age of 40 years by Northwestern National Life Insurance Company, and I am filing this charge on my behalf and on behalf of all other employees and former employees over the age of 40 years. Northwestern National Life Insurance Company has discriminated and continues to discriminate on the basis of age against its employees.

Id., at 41a-42a.

Approximately seven months after filing this charge as prescribed by the Age Discrimination in Employment Act

(29 U.S.C. § 621 *et seq.*) ("ADEA"), Ulvin commenced this suit as a class-wide collective action alleging violations of the ADEA. Eighth Circuit Opinion, App., *infra*, at 3a.[1] Specifically, he asserted that his job was eliminated as part of a comprehensive company-wide reduction-in-force which included both terminations and forced retirements. District Court Complaint ¶ 11(b) and (c), App., *infra*, at 30a-31a. By April 1, 1990, following notice ordered by the district court, more than fifty former and current NWNL employees had elected to opt into the action and filed their consents, as required by 29 U.S.C. § 216(b). Eighth Circuit Opinion, App., *infra*, at 3a; District Court Opinion, App., *infra*, at 16a.

Among the opt-in plaintiffs who had received notice of the action were six former employees: petitioners Doris J. Anderson, Leo J. Anderson, Marjorie L. Betts, Donald Feroe, Wayne Keplinger and Katherine Koenig (the "forced retirees"). The forced retirees lost their jobs under a special NWNL retirement program which ran from September 15, 1987 to October 30, 1987, as a component of a company-wide reduction-in-force. District Court Complaint, App., *infra*, at 31a; Ulvin Charge, App., *infra*, at 41a. Ulvin's job, also a casualty of the comprehensive reduction, was eliminated on October 23, 1987. District Court Complaint, App., *infra*, at 31a.

On August 15, 1990, the district court granted NWNL's motion for partial summary judgment and dismissed the claims of the forced retirees on the grounds that they lacked a timely charge upon which to rest their claims. District Court Opinion, App., *infra*, 16a. The district

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[1] Ulvin alleged in his complaint that:

> [NWNL] engaged in a pattern and practice of age discrimination . . . in its hiring, assignment, transfer, promotion, compensation, layoff, termination and disciplinary practices, and in harassment, including intimidation and retaliation . . . [and] through an early retirement program [using] threats of permanent layoffs.

District Court Complaint ¶¶ 10, 11(b) and (c), App., *infra*, 30a-31a.

court ruled that Ulvin's EEOC charge could not serve as a basis for the forced retirees to join in the litigation because it did not give NWNL adequate notice that Ulvin was filing the claim on their behalf. The district court based this conclusion upon the observation that Ulvin himself was not eligible for early retirement under the program and his charge did not specifically mention early retirement. *Id.*

On appeal, the Eighth Circuit affirmed, ruling that the opt-in plaintiffs who were forced retirees could not piggyback their claims on Ulvin's charge because they were not "similarly situated" to him, as required by the ADEA. Eighth Circuit Opinion, App., *infra*, 7a. This conclusion rested on the fact that Ulvin was not eligible for the early retirement program when he was fired, whereas these opt-ins claimed they had been forced to retire. *Id.* Accordingly, despite the prior court-approved notice and invitation to opt in, these six petitioners have been dismissed from the case.[2]

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted because the circuit courts of appeals are in conflict over the criteria that claimants must meet to opt into an ADEA action. The issue is of considerable importance to the administration of justice under the ADEA. The Eighth Circuit incorrectly decided the issue in light of the guidelines established by this Court, the plain meaning of the statute and Congressional intent.

It is uniformly recognized that a charge of age discrimination filed with the EEOC by one individual may be relied upon by others to satisfy the charge-filing provisions of the ADEA and join a law suit brought by the

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[2] Clinton Carlson, an appellant before the Eighth Circuit on different grounds, is not a petitioner.

charging party against their employer. *See, e.g., Bean v. Crocker National Bank*, 600 F.2d 754, 760 (9th Cir. 1979). This principle is known as the "single filing rule." *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057 (2nd Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 1641, 113 L. Ed. 2d 736 (1991). However, the courts have used incompatible tests, either alone or in combination, for determining whether a particular charge suffices to permit other claimants to "piggyback" on it under the single filing rule. *Id.*

> The broadest [Second Circuit] test requires only that the claims of the administrative claimant and the subsequent plaintiff arise out of the same circumstances and occur within the same general time frame . . . A somewhat narrower test requires that the administrative claim give notice that the discrimination is "class-wide," *i.e.*, that it alleges discrimination against a class of which the subsequent plaintiff is a member. *See Kloos v. Carter-Day Co.*, 799 F.2d 397, 401 (8th Cir. 1986) (alternate standard). A still narrower test requires that the administrative claim not only allege discrimination against a class but also allege that the claimant purports to represent the class or others similarly situated. *See Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir. 1981).

Id., at 1057-58.

Thus there are, at present, at least three different standards for determining whether someone who wishes to join or opt into a pending case can piggyback on the individual plaintiff's ADEA charge.[3] This confusion is

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[3] A further source of confusion about the scope of an ADEA collective action is the issue of the applicability of the class action rule, Fed. R. Civ. P. Rule 23. The Supreme Court has denominated the ADEA case with multiple plaintiffs a "collective action," *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. ——, 110 S. Ct. ——,

compounded by conflicting applications of the statutory criterion that limits opt-ins to persons who are "similarly situated". 29 U.S.C. § 216(b).[4] By narrowly construing this criterion to require virtual identity of the claims of the charging party and the opt-ins, the Eighth Circuit has undercut the "single filing rule," as endorsed in its own earlier decision in *Kloos v. Carter Day Co.*, *supra*, 799 F.2d at 397, as well as the overall ADEA enforcement scheme.

It is abundantly clear that the forced retirees who sought to opt into Ulvin's case would have fared differently under the varying criteria enunciated in the several circuits.

In the Second Circuit, by analogy to actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, aggrieved individuals are permitted to join in an ADEA lawsuit bought by a plaintiff who has filed a timely administrative charge provided the claims arise out of "similar discriminatory treatment in

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107 L.Ed.2d 480, 488 (1989), thereby differentiating it from a Rule 23 class action. However, while some courts have recognized that Rule 23 "opt out" actions and ADEA "opt in" actions are "mutually exclusive and irreconcilable", *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975), others have required compliance with Rule 23. *See Shushan v. University of Colorado at Boulder*, 132 F.R.D. 263, 264-65 (D. Colo. 1990).

This conflict also has been recognized by a host of courts and commentators. E. Spahn, *Resurrecting the Spurious Class: Opting-in to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 Geo. L.J. 119 (1981) ("Spahn"). "Grappling with this living fossil [*i.e.*, the "hybrid" or "spurious" class action which survived the 1966 revisions of Rule 23], the courts conflict, frequently appearing quite baffled about how it actually operates."

[4] This opt-in criterion originates in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and is expressly incorporated in the ADEA, 29 U.S.C. § 626(b), which was grafted on the FLSA.

the same time frame." *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1056. Such persons may opt into an ADEA lawsuit where there is "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Id.*, at 1058. In effect, the Second Circuit has merged the "single filing rule" with the "similarly situated" criterion to create a single standard that focuses upon the scope of the charge. As a result, in *Tolliver*, both employees who were forced to retire and those who were fired as part of a reduction-in-force were permitted to participate in the case. *Id.*, at 1060.

Under this standard, Ulvin's charge and the circumstances of his claim would readily encompass the claims of the forced retirees, allowing them to piggyback their complaints onto his and opt into this action. All of the claims arose out of NWNL's company-wide reduction-in-force which was targeted at older workers within the same time frame. District Court Complaint, App., *infra*, at 31a.

The Third Circuit also has merged the two standards, but in a narrower manner which, like the Eighth Circuit's decision, would defeat the "single filing rule." It requires that the complainant and opt-in plaintiffs be employed by the same corporate department, be terminated as a result of a pattern, plan or practice of willful age discrimination, and be seeking the same-relief. *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3d Cir. 1989). Thus the Third Circuit places its focus upon the particulars of the individuals concerned, rather than the charge, and looks for a high degree of identity among plaintiffs, rather than similarity.

The Ninth Circuit requires the ADEA plaintiff in a collective action simply to have alleged discrimination against a class and the intent to encompass a class or others similarly situated in his or her case. *Bean v. Crocker National Bank*, 600 F.2d 754, 760 (9th Cir.

1979). Thus the Ninth Circuit implicitly integrates the "single filing rule" and the "similarly situated" criterion within a notice standard where the scope of the charge effectively defines who meets the latter criterion. In this regard, the Seventh Circuit follows the Ninth. *See Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1016-17 (7th Cir. 1988). The Tenth Circuit follows a notice standard, comparable to the Ninth Circuit's position, holding that opt-in plaintiffs may piggyback where the charges filed with the EEOC alleged that the employer's "arbitrary action constitutes age discrimination against workers over 40" and thus provided the opportunity to investigate a broad claim. *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-95 (10th Cir. 1980). In contrast to the approach of the Eighth Circuit in this case, the Tenth Circuit also ruled in *Mistretta* that opt-in plaintiffs could piggyback their salary claims onto charges of wrongful termination under the ADEA. *Id.*[5]

In summary, the decision of the Eighth Circuit in this case conflicts in both reasoning and in result with decisions of the Second, Seventh, Ninth and Tenth Circuits.[6]

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[5] The *Mistretta* court allowed the litigation of claims under a novel salary theory not identified in the administrative charges which alleged wrongful termination. The discriminatory salary policy was known as "stretch out", and held back salary increases for older employees in order not to "insult[]" them. This issue was not raised in any of the administrative complainants' charges which concerned only wrongful termination. *Id.*, at 595-596.

[6] The Eighth Circuit's focus on the omission from the charge of a reference to forced retirement as a component of the comprehensive reduction-in-force is also contrary to the intent of Congress as construed by other courts.

> [T]he conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant and *generally* describes the action believed to be discriminatory.

H.R. Conf. Rep. No. 950, 95th Cong., 1st Sess. 13 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 534 (emphasis added).

[Continued]

Moreover, it both ignores and undermines the concept of a collective action to enforce ADEA rights.

The Eighth Circuit's construction of the "similarly situated" criterion is the conceptual equivalent of a requirement that the original charging party have standing to assert every claim that could be asserted by an opt-in plaintiff. However, this approach misconstrues the nature of a multiple plaintiff action under the ADEA. As this Court noted in *Hoffman-La Roche Inc. v. Sperling*, *supra* at n. 3, "Congress left intact the 'similarly situated' language providing for collective actions . . . ." 493 U.S. ——, 110 S. Ct. ——, 107 L. Ed. 2d 480, 490-91 (1989). Because an ADEA suit such as this is a collective action of identified, consenting individuals personally suing under the umbrella of a charge, *id.*, 493 U.S. at ——, 110 S. Ct. at ——, 107 L. Ed. 2d at 488, and not a Rule 23 class action involving absent class members, the "standing" approach to the application of the "similarly situated" criterion is inapposite.[7]

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[6] [Continued]

Accordingly, the First Circuit has noted that an EEOC charge in an ADEA case is not a blueprint for the litigation to follow. *Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990).

> The charge is not to be treated as a common-law pleading that strictly cabins the investigation . . . The charge merely provides the EEOC with a "jurisdictional springboard to investigate whether the employer is engaged in *any* discriminatory practices."

Id., at 38 (emphasis added) (quoting *EEOC v. General Electric Co.*, 532 F.2d 359, 364 (4th Cir. 1976), and *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975)). "[T]he exact wording of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." *Id.*, at 39 (quoting *Tippler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971), and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970)). The Eighth Circuit's requirement for detail in the charge specifying each of the manifestations of the discriminatory force reduction is contrary to this rule of construction.

[7] The Seventh Circuit observed that the ADEA collective action "more closely resembles a multiple plaintiff joint action than it

In contrast, the Second Circuit's construction of the "single filing rule" in tandem with the "similarly situated" criterion comports with the concept of a collective ADEA action by multiple plaintiffs.[8] It also most closely follows the intent, and effectuates the purpose, of Congress in amending the ADEA in 1978, as expressed in its language and legislative history.[9]

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resembles a class action." There are no absent parties who would be bound by a judgment or entitled to assert a claim. *Anderson v. Montgomery Ward & Co., Inc., supra*, 852 F.2d at 1018.

[8] Two lower courts also have provided clearly reasoned opinions on this issue. *See, e.g., Heagney v. European American Bank*, 122 F.R.D. 125, 128 (E.D.N.Y. 1988), where the issue presented was identical to that here. After exacting analysis of the circumstances of the administrative claimant and opt-in plaintiffs, early retirees were held similarly situated to employees who were fired, laid off or resigned under pressure.

See also Allen v. Marshall Field & Co., 93 F.R.D. 438, 443 (N.D. Ill. 1982) (opt-in plaintiffs in an ADEA collective action need not show their positions are identical, but only that they are similar; differences in particular adverse consequences of a campaign that different individuals allege—whether discharge, forced early retirement, demotion, or transfer to a dead-end job—will be relevant primarily to the computation of damages).

Frank v. Capital Cities Communications, Inc., 33 Empl. Prac. Dec. (CCH) ¶ 34,285 at p. 33,084 (S.D.N.Y. 1983) (former and present employees performing a variety of jobs over a wide geographic range and claiming discrimination in a number of ways were not to be deprived of class status where they worked for the same employer, were within the protected age range, and claimed to have been victims of the same campaign of age-motivated harassment).

Behr v. Drake Hotel, 586 F. Supp. 427, 431-32 (N.D. Ill. 1984) (ADEA plaintiffs "need only show that their positions are similar; they need not be identically situated to potential class members . . . differences among employees with respect to employment responsibilities or discriminatory injuries suffered does not mean they are so dissimilarly situated as to render inappropriate opting into this case").

[9] It also comports with the common understanding of the term "similarly situated."

"Similar" is defined as "showing some resemblance; related in appearance or nature; alike though not identical." *The American*

The pertinent provision of the ADEA originally read:

> [N]o civil action may be commenced under . . . this section until *the individual has given* the Secretary . . . *notice* . . ."

Pub. L. No. 90-202, 81 Stat. 602, 604 (1967) (emphasis added).

On April 6, 1978, Congress amended it to read:

> [N]o civil action may be commenced by an individual under this section until 60 days after *a charge* alleging unlawful discrimination *has been filed* with the Secretary.

Pub. L. No. 95-256, 92 Stat. 189, 190 (1978) (emphasis added).[10]

The impact of this amendment was to shift the emphasis from the individual's act of filing the charge to the simple fact that "a charge" was on file. Thus the Second Circuit wrote:

> In changing the statutory requirement from a charge filing obligation of the individual bringing suit to the more general requirement that "a charge . . . has been filed," Congress pointed out that "[f]ailure to timely file the notice . . . [was] the most common basis for dismissal of ADEA lawsuits by private individuals" and emphasized that the purpose of the amendment was "to make it more likely that the

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Heritage Dictionary of the English Language (1979) at p. 1206. The accompanying usage note states that: "*Similar* is often misused in nontechnical contexts where *same* or *identical* would convey the sense actually intended . . . ."

"Identical" is defined as "1. Being the same. 2. Being exactly equal." *Id.*, at p. 653.

Common definition and usage of terminology are relevant to proper construction of statutory language. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980).

[10] Section 7(d) currently provides that the charge is to be filed with the EEOC. *See* 29 U.S.C. § 626(d).

> courts will reach the merits of the cases of aggrieved individuals . . . ."

Tolliver v. Xerox Corp., *supra*, 918 F.2d at 1056, quoting S. Rep. No. 493, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 515.

Conversely, the Eighth Circuit's ruling here contravenes the express intent of Congress in adopting the 1978 amendment. By focusing on Ulvin, the individual, rather than his charge, and adopting a crabbed definition of "similarly situated," that court has gutted the object of the 1978 amendment. Further, it encourages unscrupulous employers to design workforce reductions which subdivide a work force in order to segregate claimants into such small groups that collective litigation would effectively be barred.[11] As one trial court observed in rejecting a narrow construction of the "single filing rule" and "similarly situated" criterion,

> To deny [plaintiffs' claims] class treatment would be tantamount to declaring that any employer can escape ADEA class liability so long as it discriminates against a diverse group of aged employees over a wide geographic range in a number of ways, such as termination, salary, promotions, and working conditions.

Frank v. Capital Cities Communications, Inc., *supra* at n. 8, 33 Empl. Prac. Dec. (CCH) ¶ 34,285 at p. 33,084.

The issue presented is of great importance in the administration of the ADEA. The collective action is seen as the best, if not the only, mechanism to enforce the rights of older workers as guaranteed by the ADEA. Spahn, *supra*, 71 Geo. L.J. at 121.

> Class actions have proved to be an invaluable device in the enforcement of the discrimination prohibitions

[11] "Discrimination, unfortunately, exists in forms as myriad as the creative perverseness of human beings can provide." *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980).

> of Title VII. As with race and sex discrimination, age discrimination is by definition class discrimination. Requiring each individual employee to file separate, identical charges with the EEOC against the same employer would tend to impede the enforcement of these prohibitions. Moreover, the general advantages of class actions—avoiding multiplicity of suits, and more importantly, allowing the prosecution of claims that otherwise might be economically infeasible—help effectuate the goals of the ADEA, and provide the most efficient adjudication of the rights of elderly workers.

J. Lipschultz, *The Class Action Suit under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications*, 32 Hastings L.J. 1377, 1382 (1981) (citations omitted).

The questions presented here potentially affect millions of American workers. In 1989, there were more than 34 million persons over 44 years' old [12] in the American civilian labor force. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1991* Table No. 632 (111th ed. 1991). Workers over the age of 44 comprised twenty-eight percent (28%) of the labor force. *Id.* This percentage is sure to increase. According to Census Bureau projections, by the year 2000 there will be over 48 million workers over the age of 44, and these workers will comprise fully thirty-four percent (34%) of the labor force. *Id.* By the year 2010, approximately one-half of the U.S. workforce is expected to be within the ADEA's protected class.[13]

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[12] The ADEA protects workers who are 40 and over. 29 U.S.C. § 631(a). Thus these census statistics are a conservative measure of the potential impact of the law.

[13] R. Boehmer, *The Age Discrimination in Employment Act—Reductions in Force as America Grays*, 28 Am. Bus. L. J. 379, 381 (1990), citing The Bureau of National Affairs, Inc., *Older Americans in the Workforce: Challenges & Solutions* (1987) at p. 6.

ADEA cases are on the rise. In 1979, approximately 5,000 cases were filed. By 1983, the number had grown to over 19,000.[14] During the 1980s, each year on average saw a seventeen percent (17%) increase in cases filed.[15] The significance of properly construing the terms which govern the scope of the action has grown commensurately.

The importance of this case also lies in the intrinsic unfairness of forced retirement. This pernicious practice was condemned by Congress.

> Mandatory retirement works severe injustices against the aged . . . . [F]or some, the opportunity to continue working has become a question of economic survival . . . . Substantial evidence exists that mandatory retirement may have a severe deteriorative impact on the physical and psychological health of older individuals.

S. Rep. No. 493, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 506-07.

Forced retirement for any reason is no less an involuntary termination than a discharge or job elimination. It is the functional equivalent of termination. To view it otherwise is to champion form over substance, as reflected in the Eighth Circuit's decision here.

The ADEA, being a remedial statute, is to be liberally construed. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 (1979) (Blackmun, J., concurring). The Eighth Circuit, in its decision below, did not "give full recognition to [the] remedial character of the ADEA." *Id.*, at 765-66. It is at

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[14] P. Keaton & B. Larson, *Age Discrimination in Employment: Case Law and Implications for Employers*, 40 Lab. L.J. 575, 580 (1989), citing J. Ivancevich & W. Gluek, *Foundations of Personnel/Human Resource Management* (4th ed. 1989).

[15] *Id.*, citing L. Dube, *Removing the Cap—Eliminating Mandatory Retirement under the ADEA*, 15 Empl. Rel. Today 199 (1988), and The Bureau of National Affairs, Inc., *Older Americans in the Workforce: Challenges and Solutions* (1987) at p. 124.

odds with the decisions of at least four other circuits, most notably the Second. This case calls for the Court to resolve this conflict to ensure that the millions of workers over the age of forty know the nature of their rights under the ADEA, and how to preserve and pursue them.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-5561

JOSEPH J. ULVIN, DORIS J. ANDERSON,
Appellant,

MARLYS ALLEN, LEO J. ANDERSON,
Appellant,

LLOYD J. ANDERSON, WILLIAM D. BARABAS,
MARJORIE L. BETTS,
Appellant,

CORA ANN BIRD, CLINTON A. CARLSON,
Appellant,

EARNESTINE COLLINS, MARY B. DEVINE, ROGER DIXON,
HELEN DUFFY, DONALD FEROE,
Appellant,

ELAINE L. FLYNN, JOYCE L. FRENCH, JOSEPH H. GRUBER, PAT M. HAUGEN, MARY HIGHTOWER, DELORES IVERSON, LEONARD W. JACKSON, JR., ARTHUR JANOTA, BONNIE JOHNSON, RONALD A. JONES, WAYNE KEPLINGER, KATHERINE KOENIG,
Appellant,

MARILYN J. KING, OTISTINE KOONTZY, THOMAS E. LAFOND, KARLA K. LARSON, DAVID N. LAWRENCE, LINDA M. LEVIN a/k/a LINDA LEVIN THOMAS, JULIE LOZANO, RENEE M. MCCARTHY, JOAN M. MIROVSKY, LINDA J. NAPIER, FLORDELIZA V. PARAYNO, NOREINE D. PHILBIN, JOHN RICHARD POTASNAK, CYNTHIA RATAJ, RICHARD REGIS, CARL W. RETTENMAYER, DAVID L. ROBERTS, MYRON GEORGE SANDEFUR, JAMES THOMAS SCANNELL, SHARON RUTH STEWART, JAMES T. SZCZECH, KAMAL

TANDON, SHELDON L. THORKELSON, JESSICA WAUKAZO, JAMES STANLEY WELMAN, STEVEN G. WILLIAMS, ERDINE L. WOLF, Mrs., as personal representative for the estate of Karl Wolf, deceased, Karen Young,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,
Appellee.

JOSEPH ULVIN, DORIS J. ANDERSON,
Appellant,

MARLYS ALLEN, LEO J. ANDERSON,
Appellant,

LLOYD J. ANDERSON, WILLIAM D. BARABAS, MARJORIE L. BETTS,
Appellant,

CORA ANN BIRD, CLINTON A. CARLSON,
Appellant,

EARNESTINE COLLINS, MARY B. DEVINE, ROGER DIXON, HELEN DUFFY, DONALD FEROE,
Appellant,

ELAINE L. FLYNN, JOYCE L. FRENCH, JOSEPH H. GRUBER, PAT M. HAUGEN, MARY HIGHTOWER, DELORES IVERSON, LEONARD W. JACKSON, JR., ARTHUR JANOTA, BONNIE JOHNSON, RONALD A. JONES, WAYNE KEPLINGER, KATHERINE KOENIG,
Appellant,

MARILYN J. KING, OTISTINE KOONTZY, THOMAS E. LAFOND, KARLA K. LARSON, DAVID N. LAWRENCE, LINDA M. LEVIN a/k/a LINDA LEVIN THOMAS, JULIE LOZANO, RENEE M. MCCARTHY, JOAN M. MIROVSKY, LINDA J. NAPIER, FLORDELIZA V. PARAYNO, NOREINE D. PHILBIN, JOHN RICHARD POTASNAK, CYNTHIA RATAJ, RICHARD REGIS, CARL W. RETTENMEYER, DAVID L. ROBERTS, MYRON GEORGE SANDEFUR, JAMES THOMAS SCANNELL,

SHARON RUTH STEWART, JAMES T. SZCZECH, KAMAL TANDON, SHELDON L. THORKELSON, JESSICA WAUKAZO, JAMES STANLEY WELMAN, STEVEN G. WILLIAMS, ERDINE L. WOLF, Mrs., as personal representative for the estate of Karl Wolf, deceased, Karen Young,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,
Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 15, 1991

Filed: September 3, 1991

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

On November 2, 1988, Joseph Ulvin and Doris Anderson filed a class action against Northwestern National Life Insurance Company alleging violation of the Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634 (1988). By April 1, 1990, more than fifty former and current Northwestern employees elected to opt into the action. The district court [1] dismissed the claims of plaintiff Doris Anderson and five of the opt-in plaintiffs because they lacked an adequate timely charge upon which to rest their claims. *Ulvin v. Northwestern Nat'l Life Ins. Co.*, No. 3-88-730, slip op. at 7 (D. Minn. August 15,

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[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

1990). The district court also dismissed the claim of a sixth opt-in plaintiff, Clinton Carlson, because he signed a termination agreement in which he unambiguously released Northwestern from all liability for claims arising out of his termination. *Id.* at 10. The appellants claim that these rulings were in error. We affirm the judgment of the district court.

On March 31, 1988, Joseph Ulvin filed a timely charge with the EEOC alleging that Northwestern discriminated against him and fired him solely on the basis of age, and that Northwestern's actions against him were part of a general pattern and practice of class-wide discrimination against all Northwestern employees over forty years old.

On September 30, 1988, Doris Anderson filed a charge with the EEOC "alleging that [Northwestern] downgraded her position, bypassed her for promotion, and forced her to accept early retirement all because of her age." Slip op. at 5.

On November 2, 1988, Ulvin and Anderson filed a class action against Northwestern. Leo Anderson, Marjorie Betts, Donald Feroe, Wayne Keplinger, and Katherine Koenig each opted into the class action, and like Doris Anderson these five opt-in plaintiffs also complained that Northwestern had discriminated against them on the basis of age and had forced them to accept early retirement. None of the five opt-in plaintiffs filed charges with the EEOC, and each opted Ulvin's class action more than 300 days after accepting early retirement.

At Northwestern's request, the district court dismissed Doris Anderson and the five opt-in plaintiffs from the suit. The court ruled that Doris Anderson did not file a timely EEOC charge, slip op. at 7, and she does not appeal that ruling. The court further reasoned that since Doris Anderson's EEOC charge was not timely, and the other early retirees did not file EEOC charges, the only way any of them could maintain an age discrimination claim

against Northwestern would be by relying on Ulvin's timely charge. *Id.* at 5 (citing *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986) (suggesting that such piggybacking ought to be permitted under the "single filing rule" where at least one plaintiff files a timely charge)). The district court refused to allow the early retirees to base their claims upon Ulvin's charge because it concluded that although the charge alleged class-wide discrimination, the scope of the charge was not sufficient to put Northwestern on notice of the early retirees' claims and did not allow an opportunity for conciliation.[2] *Id.* at 6-7.

Appellants cite *Kloos* for the proposition that opt-in plaintiffs can rely on the timely charge of another plaintiff provided the charge "alleges class-wide discrimination or claims to represent a class." *Kloos*, 799 F.2d at 402. They argue that the district court erred by adding a new requirement to the rule of *Kloos*.

In *Kloos*, the plaintiff, Charles Kloos, sued Carter-Day Company, alleging that it discriminated against him on the basis of age. Thirteen others opted into the action. Of the thirteen opt-in plaintiffs, one had filed a timely charge, and another based his claim on a termination that occurred within 300 days of Kloos's motion for class certification. The district court dismissed for lack of subject matter jurisdiction the eleven opt-in plaintiffs who had not filed their own charges and had been terminated more

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[2] Ulvin's charge contained the following clause:

> *STATEMENT OF CLASS WIDE DISCRIMINATION ON BASIS OF AGE:* I believe that Northwestern National Life Insurance Company's treatment of me is part of a general pattern and practice of discrimination against individuals over the age of 40 years by Northwestern National Life Insurance Company, and I am filing this charge on my behalf and on behalf of all other employees and former employees over the age of 40 years. Northwestern National Life Insurance Company has discriminated and continues to discriminate on the basis of age against its employees.

than 300 days before Kloos' motion for class certification. *Kloos*, 799 F.2d at 399.

On appeal of the dismissal, Kloos argued that the administrative charges that he and one opt-in plaintiff filed provided an adequate basis to support the claims of the eleven opt-in plaintiffs who did not file charges. This court rejected Kloos' argument because we concluded that neither of the administrative charges alleged class-wide age discrimination or claimed to represent a class. *Id.* at 401. We also rejected Kloos' argument that an administrative charge alleging a personal claim should be construed broadly to include any matter that might reasonably grow out of the investigation of the original charge. *Id.* We affirmed the district court's decision to dismiss the eleven opt-in plaintiffs, stating: "Although ADEA opt-in class plaintiffs should not be required personally to file administrative charges, an ADEA class action must be based upon a charge that *at least* alleges class-wide discrimination or claims to represent a class." *Id.* at 402 (emphasis added).

Thus, *Kloos* only answered the narrow question of whether this circuit would recognize the single filing rule. The case did not address the more difficult question of whether there is any limit to the nature or type of claims opt-in plaintiffs can raise while relying upon another plaintiff's filing.

We stated in *Kloos* that the administrative filing requirement serves two important purposes. It gives the EEOC an opportunity to eliminate unlawful practices through informal conciliation, and it provides employers with formal notice of the charges being brought against them. *Id.* at 400. Keeping these purposes in mind, there must be some limit to what claims an opt-in party can raise when relying on the administrative filing of another. Certainly, when the filed charge is quite specific as to the scope of the class claim it raises, opt-in plaintiffs should

not be permitted to raise claims that are far outside of that scope. Otherwise, the purposes of requiring an administrative filing would be thwarted; the EEOC would not be able to achieve any meaningful conciliation and employers would not be on notice as to the nature of the potential claims of opt-in plaintiffs.

Here, Ulvin's charge complained only that Northwestern demoted and subsequently fired him because of age. Nowhere in the charge did Ulvin mention Northwestern's early retirement program, or that Northwestern was coercing older employees into accepting early retirement. Ulvin was not eligible to participate in Northwestern's early retirement program. Northwestern terminated Ulvin seven days before the deadline for potential early retirees to announce their decision whether or not to retire. No early retirees filed a complaint with the EEOC until September 30, 1988, almost one year after the deadline for selecting early retirement had passed. Thus, Ulvin's EEOC charge did not alert Northwestern to the claims of the early retirees, nor did it create the possibility that the EEOC or Northwestern would attempt to conciliate the claims of early retirees.

Ulvin's EEOC charge was too narrow to support the discrimination claims of the early retirees. For this reason, we affirm the district court's decision to dismiss Doris Anderson and the other five early retirees from Ulvin's class action.

II.

The second claim on appeal concerns opt-in plaintiff Clinton Carlson, who left Washington Square Capital, a wholly-owned subsidiary of Northwestern, under a negotiated termination agreement. Under the agreement, Carlson agreed to release Washington Square Capital and its affiliates of all liabilities, severance pay or any other obligation, except as set forth in the agreement.[3] In

[3] The release stated: "Acceptance by you constitutes a full and complete release of WSC and its affiliates with respect to liabilities, severance pay or any other obligation except as set forth herein."

exchange for this release, Northwestern agreed to pay Carlson approximately $33,800 in severance pay and to extend his group life, health and disability insurance coverage for six months after his last day of employment. Carlson also negotiated for the inclusion of a clause whereby Washington Square Capital agreed to release him from liability for any loss that the company might incur as a result of his employment. Slip op. at 10.

Carlson attempted to opt into Ulvin's class action, arguing that the termination agreement did not waive his AEDA claims because it did not specifically mention them. The district court dismissed Carlson from the case, holding that the termination agreement "clearly and unambiguously release[d Northwestern] from liability for the claims asserted by Carlson." *Id.* Following *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987), the court applied ordinary contract principles and concluded that when signing the termination agreement Carlson was not " 'bereft of the quality of mind essential to the making of a contract.' " Slip op. at 10 (quoting *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985)). In reaching this conclusion the district court relied on the holding of *Lancaster*, that a termination agreement containing a broad release of all claims validly releases an employee's ADEA claims. 809 F.2d at 540-41.

Appellants ask this court to modify our holding in *Lancaster* because the Older Workers Benefit Protection Act, Pub.L. 101-433, § 201, 104 Stat. 978, 983 (1990) (codified as amended at 29 U.S.C.A. § 626(f) (West. Supp. 1991)), clarified Congress' intent with regard to the waiver of ADEA claims. Under amended section 626(f), an individual may not waive any ADEA rights or claims except by a written waiver that specifically refers to the ADEA rights being waived. Appellants urge this court to consider the 1990 agreement as evidence of Congress' intent with regard to waivers signed prior to the amendment.

The answer to appellants' argument is contained in the following express language of the 1990 amendment: "[this amendment] shall not apply with respect to waivers that occur before the date of enactment of this Act." Pub.L. 101-443, § 202(a), 104 Stat. 984 (1990).[4]

Appellants argue that even if the recent amendment to section 626 is not controlling, this court should abandon *Lancaster* and follow the more stringent standard that the Second Circuit followed in *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir.), *cert. denied*, 110 S.Ct. 292 (1989).[5] This court recently reaffirmed the validity of *Lancaster* in *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir. 1990). Furthermore, the district court concluded that Carlson's release would have been valid under *Bormann*, slip op. at 11, and the court did not err in this respect.

Appellants also make the broad claim that "there is a material factual dispute as to whether there was a 'voluntary and knowing' release of Carlson's rights under the ADEA," claiming that "at the very least there are disputed issues of fact that should be resolved by a jury."

Carlson was a vice president in Washington Square Capital's Real Estate Department when he signed the termination agreement. The district court observed that

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[4] We are aware that the Senate Report for the 1990 amendments disapproved this court's approach in *Lancaster*. S. Rep. No. 263, 101st Cong., 2d Sess. 31-32, *reprinted in* 1990 U.S. Code Cong. & Admin. News 1509, 1537. Congress is fully capable of enacting legislation that will limit or change a rule announced by a court, but it did not do so in this case and its comments do not provide a sufficient basis for this court to refuse to follow our earlier precedent.

[5] In *Bormann*, the Second Circuit elected to follow the Third Circuit and apply a "totality of the circumstances" standard, rather than ordinary contract principles, when determining whether an employee knowingly and willfully waived ADEA claims. 876 F.2d at 403.

Carlson had access to the agreement for a considerable amount of time, that he chose not to consult an attorney, and that he was able to negotiate the addition of favorable terms to the agreement. Slip op. at 10. The court also stated that the agreement was written in clear, simple language, that it granted Carlson severance benefits in excess of those required by contract or statute, and that Carlson decided to sign the agreement of his own free will. *Id.*

Appellants point to no specific facts about which there is a material dispute, and we reject their general argument. Accordingly, we affirm the district court's order dismissing Clinton Carlson from Ulvin's class action.

We affirm the judgment of the district court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File Nos. 3-88-730 and 3-88-793

JOSEPH J. ULVIN and DORIS J. ANDERSON,
Plaintiffs,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,
Defendant.

Paul C. Sprenger, Esq., Jean M. Boler, Esq., Sprenger & Lang, 325 Ridgewood Avenue, Minneapolis, MN 55403; Jane Lang, Esq., Rebecca K. Troth, Esq, Sprenger & Lang, 1614 20th Street, N.W., Washington, D.C. 20009, for the plaintiffs.

Thomas P. Kane, Esq., Marko J. Mrkonich, Esq., Peggy A. Gunn, Esq., John M. Stoxen, Esq., Oppenheimer, Wolff & Donnelly, 1700 First Bank Building, St. Paul, MN 55101, for the defendant.

MEMORANDUM AND ORDER

[Filed Aug. 15, 1990]

This matter is before the court upon defendant's motion for partial summary judgment and for sanctions. Defendant seeks dismissal of a number of plaintiffs who have opted-into this age discrimination action. Counsel for the plaintiffs has agreed to withdraw the consent

forms of a number of opt-in plaintiffs. The court therefore will grant defendant's motion to dismiss the ADEA claims of these plaintiffs at this time. The state law discrimination claims of these plaintiffs will be dismissed without prejudice. The plaintiffs to be dismissed in this way are:

1. Noreine Philbin
2. Renee McCarthy
3. Ron Jones
4. Joan Mirovsky
5. Cynthia Rataj
6. Linda Levin Thomas
7. Kamal Tandon
8. Roger Dixon
9. Mary Hightower

Another of the opt-in plaintiffs, Karl Wolf, died shortly after he filed his consent to join this action. At the hearing on this matter the court instructed counsel for the plaintiffs to confer with Wolf's family and decide whether to pursue a claim in this case. The court will therefore defer any ruling as to plaintiff Wolf until plaintiffs' counsel reports back to the court.

Defendant asserts that thirteen of the remaining plaintiffs have legally insufficient ADEA claims as well. Plaintiffs respond in two ways. First, they contend that a summary judgment motion is premature at this time because no class has yet been certified in this action. Second, they argue that each of the opt-in plaintiffs has a legally sufficient ADEA claim.

The enforcement provisions of the ADEA, 29 U.S.C. § 626(b), incorporate certain procedures of the Fair

Labor Standards Act (FLSA). In part the FLSA provides:

> An action to recover . . . liability . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b). An ADEA action under § 626(b) and § 216(b) is merely a permissive joinder device for plaintiffs who are similarly situated. Such an action may be maintained on behalf of only those individuals who have given their consent in writing to join the action. The court has previously ruled that a Rule 23 class may be certified for state law age discrimination claims at some point in the future, but the Rule 23 class may not include plaintiffs who do not have legally sufficient ADEA claims. The time for adding ADEA plaintiffs to this action has long passed. Therefore, it is entirely appropriate for the court to determine whether the opt-in plaintiffs have legally sufficient claims before addressing issues of class certification under Rule 23.

Defendant's motion is governed by the standards set forth in Rule 56. Defendant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings, depositions, and affidavits which defendant believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to defeat the motion, plaintiffs must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The judge's function at the summary judgment

stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. *Id.* at 249.

A representative action under the ADEA allows persons with otherwise valid claims to join in a suit brought by someone with similar claims. The ADEA does not allow individuals without valid claims to join in the lawsuit of another. With this in mind, defendant challenges the claims of thirteen of the plaintiffs in this action. Defendant contends that eleven of the plaintiffs' claims are time barred, one of the plaintiff's claims is subject to an unconditional release, and one is unsupported by any evidence of discrimination whatsoever.

In order to be eligible to join an ADEA action an opt-in plaintiff must show that discrimination against him occurred within 300 days of the EEOC class charge. In this case named plaintiff Joseph Ulvin filed a discrimination charge with the EEOC on March 31, 1988. Ulvin claimed that he was demoted and then involuntarily terminated on October 23, 1987, because of his age. Ulvin's charge also contained the following statement:

> I believe that Northwestern National Life Insurance Company's treatment of me is part of a general pattern and practice of discrimination against individuals over the age of 40 years by Northwestern National Life Insurance Company, and I am filing this charge on my behalf and on behalf of all other employees and former employees over the age of 40 years. Northwestern National Life Insurance Company has discriminated and continues to discriminate on the basis of age against its employees.

The first step in assessing the timeliness of an EEOC charge is determining the time at which the discrimination claim accrued. The case of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), provides some guidance. In *Ricks* the plaintiff, a college professor, alleged that he was denied tenure because of his national origin. The

Supreme Court ruled that the plaintiff's Title VII claim accrued at the time Ricks received a letter officially denying him tenure, even though Ricks continued to work at the college under a "terminal contract" for another year. In *Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 288 (8th Cir. 1988), the Eighth Circuit applied the reasoning of *Ricks* to an ADEA case and found that an employee's discrimination claim accrued when the employer notified him of the termination, not on the date that severance benefits ran out.

Defendant does not challenge the timeliness of Ulvin's discrimination charge but contends that the other named plaintiff, Doris Anderson, did not file a timely EEOC charge. Anderson filed a charge on September 30, 1988, alleging that NWNL downgraded her position, bypassed her for promtion, and forced her to accept early retirement all because of her age. Anderson accepted early retirement on October 30, 1987, but continued to work for NWNL until February of 1988. Applying *Ricks* and *Wilson* to Anderson's claim, it is clear that the claim accrued on October 30, 1987. Thus, Anderson's charge was not timely.

The only way that Anderson may maintain an ADEA claim is by relying on Ulvin's timely EEOC charge. In *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986), the Eighth Circuit stated that "it is sufficient for one or more plaintiffs to the action to have properly filed a charge." However, the court also held that "[a]n administrative charge of one or more plaintiffs setting forth only personal claims for discrimination . . . is not sufficient to serve as the basis for an ADEA class action." *Id.* Here Ulvin's charge clearly stated class-wide age discrimination claims. Nevertheless, defendant points out that Ulvin was not eligible for early retirement. Consequently, defendant argues that Ulvin does not have standing to assert claims for forced early retirement and that Ulvin's EEOC charge cannot serve as a basis for an ADEA class action on such claims.

As the Eighth Circuit stated in *Kloos*, the administrative charge filing requirement serves two purposes. First, it gives the state agency or the EEOC an opportunity to eliminate unlawful practices through conciliation. Second, it provides formal notice to an employer of the charges against it. *Id.* The court explained that "[a]llowing class actions without administrative charges *that fairly anticipate class claims* would undermine the notice and concilation purposes of the filing requirement." *Id.* (emphasis added). Ulvin's charge serves neither purpose with respect to Anderson's claim of forced early retirement. The EEOC could not have entered into conciliation with Ulvin and NWNL concerning the early retirement program because Ulvin was not eligible to participate in it. Moreover, the charge does not even mention the early retirement program. On its face the charge would not put NWNL on notice that the program might be discriminatory.

Plaintiffs cite the case of *Hoffman-LaRoche, Inc. v. Sperling*, 110 S. Ct. 482 (1989), for the proposition that opt-in plaintiffs may automatically join a valid ADEA case with classwide claims once it is filed. The Supreme Court made no such ruling. The Court was faced with "the narrow question of whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to potential members of the class. . . ." *Id.* at 486. In ruling that district courts have such discretion, the Supreme Court declined to examine the terms of the court authorized notice, including the substantive charges of the plaintiffs.

Because Anderson's EEOC charge was not timely, it must be dismissed. None of the other plaintiffs challenging the early retirement program filed administrative charges. Therefore, their claims must suffer the same fate. Accordingly, the ADEA claims of opt-in plaintiffs Leo Anderson, Marjorie Betts, Donald Feroe, Wayne Keplinger, and Kathryn Koenig will be dismissed.

Defendant also challenges the ADEA claims of five additional opt-in plaintiffs who did not file EEOC charges. Defendant contends that David Roberts, Richard Regis, Sheldon Thorkelson, Otistine Koontzy and Joseph Gruber were terminated more than 300 days before Ulvin filed his EEOC charge. Plaintiffs do not contest this fact, but they argue that the period did not commence upon termination because they had no knowledge of defendant's illegal acts. Essentially, they contend that the 300-day filing period should be extended by virtue of equitable tolling. The ADEA filing period is subject to equitable tolling. *Heideman v. Plaintiffs, Inc.*, 904 F.2d 1262, 1265 (8th Cir. 1990). However, "[e]quitable tolling is appropriate to miss a filing deadline are out of his hands. *Id.* at 1266 (citing *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989). "[E]quitable tolling arises only upon some positive misconduct by the party against whom it is asserted." *Heideman*, 904 F.2d at 1266 (quoting *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950, 952 (8th Cir. 1986)).

In *Heideman* the plaintiff was demoted and subsequently fired from his employment. More than seven years later Heideman received a copy of a "smoking gun" memorandum that had been circulated to the president of the company and which described a policy designed to rid the company of older workers such as Heideman. After receiving the memorandum Heideman filed an EEOC charge and subsequently a civil action. Although Heideman had not been satisfied with the explanation he received when he was fired, he did not suspect age discrimination until he received the memorandum.

Because his filing was not timely, Heideman sought equitable tolling on the grounds that his employer affirmatively concealed the reason for his discharge. The district court rejected Heideman's position and granted summary judgment for the employer. The court of ap-

peals affirmed, stating that "there is nothing on the record to indicate that the company successfully misled Heideman or prevented him from discovering or pursuing his rights under the ADEA. He concedes he was on notice from the very beginning that something was amiss." *Heideman*, 904 F.2d at 1266.

The same is true in this case. Each of the five opt-in plaintiffs believed that he or she was treated unfairly. Indeed, Gruber admits that he suspected that NWNL intentionally demoted and terminated employees as they got older but did not realize that such conduct was illegal until Ulvin filed this action. The other employees believed that their performance had been improperly assessed, inadequate reasons had been given for adverse employment decisions, and, in at least two cases, that they had been replaced by younger employees.

The evidence in the record does not establish a case for equitable tolling. The conduct of the employer in *Heideman* was far more egregious than that shown here. Plaintiffs have not shown a genuine issue of material fact with respect to equitable tolling, and the claims of plaintiffs Koontzy, Roberts, Regis, Thorkelson and Gruber must be dismissed.

Defendant also seeks dismissal of the claims of Clinton Carlson. Defendant cites a document signed by Carlson at his resignation which states in part as follows:

> Acceptance by you constitutes a full and complete release of WSC and its affiliates with respect to liabilities, severance pay or any other obligation except as set forth herein.

This severance agreement clearly and unambiguously releases NWNL from liability for the claims asserted by Carlson. The Eighth Circuit has held that NWNL may release an employee's claims by executing a private agreement, even where the agreement does not expressly men-

tion ADEA claims. *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir. 1987), *cert. denied*, 482 U.S. 928 (1987). Further, in determining whether the release was knowingly and voluntarily given, the court is to apply ordinary contract principles. *Id.* at 541.

Here, as in *Lancaster*, Carlson had access to the agreement for a considerable period of time, chose not to consult an attorney, and negotiated favorable additions to the agreement on his own. Specifically, Carlson requested and received a clause releasing him from all liability that his employer might incur due to his employment. The agreement is written in clear and simple language, and it grants Carlson severance benefits in excess of that required by contract or statute. Considering these factors the court cannot conclude that defendant's wrongful acts caused Carlson to be "bereft of the quality of mind essential to the making of a contract." *Anselmo v. Mutual Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (citation omitted). The difficulty of the choice that Carlson faced does not mean that he lacked the requisite free will to make the decision. *Id.*

The parties cite the case of *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989), for the proposition that a more stringent standard should be applied to this kind of release. In *Bormann* the Second Circuit noted recent congressional activity that indicated significant support for limiting the use of such releases. Based on this expression of congressional intent the Second Circuit declined to follow *Lancaster* and adopted a "totality of the circumstances" test instead. This court is bound to follow Eighth Circuit precedent, but even under the *Bormann* standard Carlson's release is valid. The only factor discussed in *Bormann* that is not present here is consultation with an attorney. Considering Carlson's experience and his ability to negotiate favorable terms, the court does not find this factor determinative.

Finally, defendant cites the complete lack of evidence to support the ADEA claim of Myron Sandefur. Plaintiffs' counsel has had ample time to obtain information from Sandefur but has not been able to do so. Defendant has a right to know the substance of each of plaintiffs' claims against it. Neither plaintiffs' counsel nor Sandefur himself has come forward with evidence. Therefore, Sandefur's ADEA claim will be dismissed.

In conjunction with this motion defendants have requested sanctions. The court is convinced that plaintiffs' counsel has acted diligently in a complex case of this nature. Counsel has a duty to ensure that no potentially valid claims are inadvertently dismissed. Therefore, defendants' motion for sanctions will be denied.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment on the Age Discrimination in Employment Act claims of:

   a. Noreine Philbin
   b. Renee McCarthy
   c. Ron Jones
   d. Joan Mirovsky
   e. Cynthia Rataj
   f. Linda Levin Thomas
   g. Kamal Tandon
   h. Roger Dixon
   i. Mary Hightower
   j. Doris Anderson
   k. Leo Anderson
   l. Marjorie Betts
   m. Donald Feroe
   n. Wayne Keplinger
   o. Kathryn Koenig
   p. David Roberts
   q. Richard Regis
   r. Sheldon Thorkelson
   s. Otistine Koontzy
   t. Joseph Gruber
   u. Clinton Carlson
   v. Myron Sandefur

   is GRANTED.

2. Any state law claims of the above named plaintiffs are DISMISSED WITHOUT PREJUDICE.

3. Defendant's motion for sanctions is DENIED.

Dated: August 15, 1990.

/s/ Paul A. Magnuson
PAUL A. MAGNUSON
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-88-0730
and 3-88-0793

JOSEPH J. ULVIN, DORIS ANDERSON, LEO ANDERSON, LEO ANDERSON, MARJORIE BETTS, DONALD FEROE, WAYNE KEPLINGER, KATHRYN KOENIG, CLINT CARLSON, *et al.*,

Plaintiffs,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,

Defendant.

ORDER

[Filed Oct. 5, 1990]

This matter is before the court upon plaintiffs' motion to certify for appeal the dismissal of certain opt-in claimants under Rule 54(b). Pursuant to Federal Rule of Civil Procedure 54(b), the court may direct entry of a final judgment as to one or more, but fewer than all of the claims or parties, only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Fed. R. Civ. P. 54(b) (1987).

In a partial summary judgment order dated April 15, 1990, the court found that Doris Anderson failed to timely file her EEOC charge. The court further found that Leo Anderson, Marjorie Betts, Donald Feroe, Wayne

Keplinger, and Kathryn Koenig failed to file administrative charges, and that Clint Carlson released the defendant from liability. Upon those findings, the court dismissed the claims of Doris Anderson, Leo Anderson, Marjorie Betts, Donald Feroe, Wayne Keplinger, Kathryn Koenig and Clint Carlson from the age discrimination action filed by Joseph Ulvin.

Based on consideration of the record and submissions from the parties, the court finds that there is no just reason for delay. The court further finds that final judgment should be entered as to the dismissed claims of Doris Anderson, Leo Anderson, Marjorie Betts, Donald Feroe, Wayne Keplinger, Kathryn Koenig and Clint Carlson.

Accordingly, IT IS ORDERED that:

Plaintiffs' motion to certify the dismissal of certain opt-in claimants under 54(b) is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 5, 1990.

/s/ Paul A. Magnuson
PAUL A. MAGNUSON
United States District Court Judge

APPENDIX D

UNTED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-5561

JOSEPH J. ULVIN, DORIS J. ANDERSON,
Appellant,

MARLYS ALLEN, LEO J. ANDERSON,
Appellant,

LLOYD J. ANDERSON, WILLIAM D. BARABAS,
MARJORIE L. BETTS,
Appellant,

CORA ANN BIRD, CLINTON A. CARLSON,
Appellant,

EARNESTINE COLLINS, MARY B. DEVINE, ROGER DIXON,
HELEN DUFFY, DONALD FEROE,
Appellant,

ELAINE L. FLYNN, JOYCE L. FRENCH, JOSEPH H. GRUBER, PAT M. HAUGEN, MARY HIGHTOWER, DELORES IVERSON, LEONARD W. JACKSON, JR., ARTHUR JANOTA, BONNIE JOHNSON, RONALD A. JONES, WAYNE KEPLINGER, KATHERINE KOENIG,
Appellant,

MARILYN J. KING, OTISTINE KOONTZY, THOMAS E. LAFOND, KARLA K. LARSON, DAVID N. LAWRENCE, LINDA M. LEVIN a/k/a LINDA LEVIN THOMAS, JULIE LOZANO, RENEE M. MCCARTHY, JOAN M. MIROVSKY, LINDA J. NAPIER, FLORDELIZA V. PARAYNO, NOREINE D. PHILBIN, JOHN RICHARD POTASNAK, CYNTHIA RATAJ, RICHARD REGIS, CARL W. RETTENMAYER, DAVID L. ROBERTS, MYRON GEORGE SANDEFUR, JAMES THOMAS SCANNELL, SHARON RUTH STEWART, JAMES T. SZCZECH, KAMAL

TANDON, SHELDON L. THORKELSON, JESSICA WAUKAZO, JAMES STANLEY WELMAN, STEVEN G. WILLIAMS, ERDINE L. WOLF, Mrs., as personal representative for the estate of Karl Wolf, deceased, Karen Young,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,
Appellee.

JOSEPH J. ULVIN, DORIS J. ANDERSON,
Appellant,

MARLYS ALLEN, LEO J. ANDERSON,
Appellant,

LLOYD J. ANDERSON, WILLIAM D. BARABAS, MARJORIE L. BETTS,
Appellant,

CORA ANN BIRD, CLINTON A. CARLSON,
Appellant,

EARNESTINE COLLINS, MARY B. DEVINE, ROGER DIXON, HELEN DUFFY, DONALD FEROE,
Appellant,

ELAINE L. FLYNN, JOYCE L. FRENCH, JOSEPH H. GRUBER, PAT M. HAUGEN, MARY HIGHTOWER, DELORES IVERSON, LEONARD W. JACKSON, JR., ARTHUR JANOTA, BONNIE JOHNSON, RONALD A. JONES, WAYNE KEPLINGER, KATHERINE KOENIG,
Appellant,

MARILYN J. KING, OTISTINE KOONTZY, THOMAS E. LAFOND, KARLA K. LARSON, DAVID N. LAWRENCE, LINDA M. LEVIN a/k/a LINDA LEVIN THOMAS, JULIE LOZANO, RENEE M. MCCARTHY, JOAN M. MIROVSKY, LINDA J. NAPIER, FLORDELIZA V. PARAYNO, NOREINE D. PHILBIN, JOHN RICHARD POTASNAK, CYNTHIA RATAJ, RICHARD REGIS, CARL W. RETTENMAYER, DAVID L. ROBERTS, MYRON GEORGE SANDEFUR, JAMES THOMAS SCANNELL,

SHARON RUTH STEWART, JAMES T. SZCZECH, KAMAL TANDON, SHELDON L. THORKELSON, JESSICA WAUKAZO, JAMES STANLEY WELMAN, STEVEN G. WILLIAMS, ERDINE L. WOLF, Mrs., as personal representative for the estate of Karl Wolf, deceased, Karen Young,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,
Appellee.

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 30, 1991

A true copy.

ATTEST: /s/ Michael E. [Illegible]

Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. ——————

JOSEPH J. ULVIN, DORIS J. ANDERSON,
Plaintiffs,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,
Defendant.

COMPLAINT

Plaintiffs, by their attorneys, Paul Sprenger and Associates, P.A., bring this action for damages and other legal and equitable relief from defendant's violations of the laws proscribing age discrimination in employment and the tort of wrongful discharge, stating the following as his claims against the defendant.

JURISDICTION AND VENUE

1. This Court has original jurisdiction to hear this complaint and to adjudicate the claims stated herein under Title 28 United States Code, Sections 1331 and 1343, this action being brought under the Age Discrimination in Employment Act, Title 29, United States Code, Section 621 *et seq.* Plaintiff also asserts claims under the Minnesota Human Rights Act, Minnesota Statutes, Section 363.01 *et seq.*, and the common law of tort for wrongfully discharging the plaintiff, for which jurisdiction is based on the doctrine of pendent jurisdiction.

2. The unlawful employment practices hereinafter described have been committed in the District of Minnesota,

the employment records relevant to those practices are, on the information and belief of plaintiff, maintained and administered at the offices of the defendant employer in the District of Minnesota, and the defendant employer has its principal office and principal place of business in the District of Minnesota.

PARTIES

3. Plaintiff Joseph J. Ulvin ("Ulvin") is a male citizen of the United States and at all times relevant hereto was a resident of Ramsey County, Minnesota. Ulvin is 46 years of age and was employed by the defendant employer from May 2, 1966 to October 23, 1987. Ulvin was demoted on January 30, 1987 to a position which was eliminated on October 23, 1987, resulting in Ulvin's termination as of that date.

4. Plaintiff Doris J. Anderson ("Anderson") is a female citizen of the United States and at all times relevant hereto was a resident of Hennepin County, Minnesota. Anderson is 59 years of age and was employed by the defendant employer from November 5, 1956 until February 29, 1988 when she took early retirement in response to indications from her employer that she would be laid off and would forfeit the special benefits available under the early retirement program.

5. Defendant Northwestern National Life Insurance Company is a Minnesota corporation which has its principal office and principal place of business at 20 Washington Avenue South, Minneapolis, Minnesota. At all times relevant hereto Northwestern National Life Insurance Company was an employer within the meaning of Title 29 United States Code, Section 630(b), and Minnesota Statutes, Section 363.01 Subd. 15.

PROCEDURAL BACKGROUND

6. On or about March 31, 1988, Ulvin filed a Charge of Discrimination with the EEOC charging Northwestern

National Life Insurance Company with age discrimination in employment. The Charge included a "Statement of Class-Wide Discrimination on Basis of Age," alleging that defendant employer's discrimination is part of a general pattern and practice of discrimination against individuals over age 40. Ulvin therefore filed his charge on behalf of himself and on behalf of all other employees and former employees over age 40. The Charge was designated as EEOC Charge Number 265880187. Ulvin has satisfied all procedural requirements applicable to this action.

7. On June 10, 1988, a former employee of defendant, Alston Steinbach, moved to amend his complaint in Federal Court to add Ulvin as a plaintiff. Ulvin also mailed a copy of the proposed Amended Complaint to the Minnesota Human Rights Department and proceedings within the Department terminated. In an order dated September 12, 1988, the Federal District Court denied the motion to amend Steinbach's complaint. Ulvin's Charge of Discrimination in the Minnesota Human Rights Department was subsequently reinstituted.

8. On or about October 4, 1988, Anderson filed a charge with the EEOC charging Northwestern National Life Insurance Company with age discrimination in employment. Anderson's charge included a "Statement of Class-Wide Discrimination on the Basis of Age," alleging that defendant employer's discrimination is part of a general pattern and practice of discrimination against individuals over the age of 40. Her charge was assigned EEOC number 265890003. As of December 3, 1988, Anderson will have satisfied all procedural requirements applicable to this action. On or soon after that date she will file an Affirmation of Suit as to her claim under the Age Discrimination in Employment Act.

CLASS ALLEGATIONS

9. As to their claims under the Minnesota Human Rights Act (MHRA) and the common law for wrongful

discharge, plaintiffs will seek the Court's notice of the pendency of this action to a proposed class defined as follows:

> All persons who applied to become, are, or were employed by the defendant at any time after becoming 40 years old.

10. With respect to their claims brought under the Age Discrimination in Employment Act (ADEA), plainitffs assert that defendants have engaged in a pattern and practice of age discrimination in violation of the Act and will seek an order permitting each member of the proposed class defined above to become a party plaintiff upon completion of a Notice of Consent to accompany the opt-in notice to each class member.

11. With respect to the proposed class defined herein, plaintiffs allege that:

(a) The class is so numerous that it is impracticable to bring all of its members before the Court. The number of class members who have been or are currently employed by defendant or applied for positions with the defendant can be determined from Northwestern National Life Insurance Company's personnel records. It is estimated that the class consists of approximately 175 persons.

(b) There are questions of law and fact common to the class. This complaint presents questions of whether the defendant, through the acts and omissions of its management and supervisory workforce, discriminated against employees of 40 years of age and over, including plaintiffs, in its hiring, assignment, transfer, promotion, compensation, layoff, termination and disciplinary practices and in harassment, including intimidation and retaliation. Inquiry into the defendant's employment practices, procedures and data will

be required to resolve this question and to fashion appropriate relief for the named plaintiffs and the class.

(c) Specifically regarding the questions of law and fact common to the named plaintiffs, Anderson was among a group of employees over the age of 50 who were eliminated in late 1987 and early 1988 through an early retirement program. The program was presented to these employees in the midst of company threats of permanent layoffs, and many of the older employees, including Anderson, were given indications that they were targeted for layoffs. Ulvin was terminated the same month, October, 1987, that Anderson was offered early retirement. Although Plaintiff Ulvin's termination was characterized as due to a reduction in force, it was, in actuality, part of the same program to eliminate older workers. Defendant employer has a pattern and practice of manufacturing performance problems in order to justify termination of middle and upper management employees over the age of 40. Consistent with this practice, Ulvan was demoted into a position which was subsequently eliminated.

During the same time period, the defendant employer hired younger and lower paid employees into the workforce.

(d) The claims of plaintiffs as representative parties are typical of those of the class, since the plaintiffs and all class members are similarly adversely affected by the discriminatory practices complained of herein. Specifically, the named plaintiffs' claims arise out of defendant's discriminatory conduct in connection with subjective decisions made by Northwestern National Life Insurance Company affecting hiring, assign-

ment, transfer, promotion, compensation, layoff, termination and discipline. Like defendant's other employees age 40 and over, plaintiffs' advancement within the company has been obstructed by these practices. Additionally, plaintiffs have experienced harassment and/or ostracism in the workforce because of their age and their opposition to the discriminatory practices of the defendant.

(e) The representative parties will fairly and adequately protect the interests of the class, inasmuch as they are representative, as reflected in the preceding subparagraphs. They have retained counsel experienced in litigating class actions in the field of employment discrimination.

(f) Defendant Northwestern National Life Insurance Company has acted and refused to act, and continues to do so, on grounds generally applicable to the class, in that it has made and effectuated decisions affecting the employment opportunities and conditions of the class members based on their age, 40 and over, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

COUNT ONE

[Age discrimination—ADEA]

12. Plaintiffs restate and reallege paragraphs 1 through 11 above as though set forth here in full.

13. Ulvin was employed by Northwestern National Life Insurance Company from May 2, 1966 to October 23, 1987. Until January 30, 1987, Ulvin was employed as Director of Production Systems.

14. On January 30, 1987, Ulvin was informed by Richard Myklebust, Ulvin's direct supervisor and Second

Vice President of Individual Operations, that he was being removed from his position as Director of Production Systems. Ulvin was subsequently demoted to the lesser position of Senior Project Manager. At that time, Mr. Myklebust and Hans Olsen, Assistant Vice President of Individual Operations, were aware or should have been eliminated. Ulvin's employment was ultimately terminated on October 23, 1987, when defendant employer eliminated the position.

15. Contrary to defendant employer's employment policies and disciplinary guidelines, prior to January 30, 1987, Ulvin received no indication or warning, either verbal or written, that his performance was unsatisfactory. Throughout his employment with defendant employer until his demotion, Ulvin's performance evaluations were excellent. He had received several promotions over the course of his employment with defendant. In January, 1988, after he was terminated, Ulvin requested a copy of his December, 1986 performance review. That review, prepared by Mr. Myklebust, was untrue and inconsistent with reviews Ulvin received previously. The review was given only as a rationalization for Ulvin's demotion and transfer into a position that was terminated. Ulvin's termination is consistent with defendant's practice of eliminating employees over the age of 40 who were earning higher salaries and receiving greater benefits than younger employees.

16. Anderson was employed by defendant from November 5, 1956 until February 29, 1988. For the last ten years of her employment with the company, she worked as a Programmer Analyst. Throughout her employment, her evaluations were very good. She consistently received merit increases and promotions based on her performance.

17. In February of 1987, Anderson was offered early retirement which she rejected. She later learned she was on a "hit list" of older employees whom the company wanted to terminated in some manner.

18. Anderson was the oldest Programmer Analyst in her unit and department. All of the other Programmers in her Unit were under the age of 40. Although she was an experienced programmer, she consistently received the least interesting and challenging programming projects. Towards the end of her employment, she was primarily given short projects and maintenance work. Other younger employees were being brought into the department to do work she could have done.

19. In the fall of 1987, Northwestern National Life Insurance Co. purchased a computer software package to replace and interface with the old system. Many meetings were held with the programmers in Anderson's unit to discuss interfacing the two systems. Anderson was the only experienced programmer consistently excluded from those meetings. Anderson knew that her exclusion from those meetings mad her more vulnerable to lay offs or reductions in the work force because she would be the least familiar with the new program.

20. In the fall of 1987, Anderson was again offered early retirement as part of an offer extended to many older employees. This offer was part of Northwestern National Life Insurance Company's pattern of forcing out older workers. The employees offered early retirement were also informed lay offs may be necessary and were given seminars on how to cope with job loss. Anderson agreed to take early retirement because she believed that she would be laid off because of her age if she did not retire.

21. Defendant has engaged and continues to engage in a general pattern and practice of terminating the employment of employees over age 40 and forcing them into retirement because of their age and the financial advantages to the defendant of eliminating older workers.

22. Plaintiffs were terminated by defendant as a result of age discrimination in violation of the Age Discrimination in Employment Act, Title 29 United States

Code, Section 621 *et seq.*, and specifically, Section 623(a)(1) thereof.

23. By reason of defendant's termination of plaintiffs' employment, plaintiffs are aggrieved, have suffered discrimination, and have ben caused injury and loss, including but not limited to the loss of compensation and employment benefits, mental anguish and distress, the stigma of being involuntarily terminated from employment, and inability to date to obtain comparable employment.

24. By reason of defendant's violation of the Age Discrimination in Employment Act, plaintiffs are entitled to recover all amounts owing under that Act including liquidated damages for defendant's willful violation of the Act and such legal and equitable relief, including reinstatement, as may be appropriate, as provided in Title 29 United States Code, Sections 626(b) and 216(b).

COUNT TWO

[Age Discrimination—MHRA]

25. Plaintiffs restate and reallege paragraphs 1 through 24 above as though set forth here in full.

26. Plaintiffs' employment was terminated by defendant as a result of age discrimination in violation of the Minnesota Human Rights Act, Minnesota Statutes, Section 363.01 *et seq.*, and specifically Section 363.03 Subd. 1(2)(b) thereof.

27 By reason of defendant's termination of plaintiffs' employment plaintiffs are aggrieved have suffered discrimination and have been caused injury and loss including but not limited to the loss of compensation and employment benefits mental anguish and distress the stigma of being involuntarily terminated from employment and inability to date to obtain comparable employment.

28. By reason of defendant's violation of the Minnesota Human Rights Act, plaintiffs are entitled to recover

compensatory damages in an amount up to three times the actual damages sustained, damages for mental anguish, and such other legal and equitable relief, including backpay, available to pursuant to Minnesota Statutes, Section 363.071 Subd. 2.

COUNT THREE

[Wrongful Discharge]

29. Plaintiffs restate and reallege paragraphs 1 through 28 above as though set forth here in full.

30. It is the expressed policy of the State of Minnesota that persons within the State be free from discrimination in employment because of their age and that employers not treat persons over the age of 40 differently than persons who are not over the age of 40.

31. The defendant has wrongfully discharged plaintiffs in violation of the public policy of the State of Minnesota.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

A. That defendant's action in terminating plaintiffs' and class members' employment be determined and adjudged to be violative of the rights of the plaintiffs and the class under the Age Discrimination in Employment Act, Title 29, United States Code, Section 621 *et seq.*, and the Minnesota Human Rights Act, Minnesota Statutes, Section 363.01 *et seq.*

B. That a judgment be entered in favor of the plaintiffs and the class and against the defendant for backpay and frontpay amounts owing to them, including an equal amount as liquidated damages (federal) and triple actual damages (state), compensatory and punitive damages, and damages for past and future mental anguish, pain and suffering in amounts to be determined at trial.

C. That plaintiffs and class members be reinstated to their employment with defendant with appropriate interim advancement and protection against retaliation in the future.

D. That plaintiffs and class members be awarded such other and further legal and equitable relief as may be found appropriate and as the Court may deem just or equitable.

E. That plaintiffs and class members be granted attorneys' fees and the costs and expenses of this action.

Dated: 11-2-88

/s/ Paul C. Sprenger
PAUL C. SPRENGER
JEAN M. BOLER
PAUL SPRENGER & ASSOCIATES, P.A.
325 Ridgewood Avenue
Minneapolis, MN 55403
(612) 871-8910

/s/ Rebecca K. Troth
REBECCA K. TROTH
PAUL SPRENGER & ASSOCIATES, P.A.
1614 Twentieth Street, N.W.
Washington, D.C. 20009
(202) 265-8010
Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand trial by jury of all issues triable of right by a jury.

Dated: 11-2-88

/s/ Paul C. Sprenger
PAUL C. SPRENGER
JEAN M. BOLER
PAUL SPRENGER & ASSOCIATES, P.A.
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Attorneys for Plaintiffs

APPENDIX F

CHARGE OF DISCRIMINATION

EEOC 265880187

MINNESOTA DEPARTMENT OF HUMAN RIGHTS
UNDER CHAPTER 363
AND EEOC

Mr. Joseph J. Ulvin
(612) 426-6319
15 Doral Road
White Bear Lake, MN 55110
Washington County

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME

Name Northwestern National Life Ins. Co.
No. of Employees/Members In excess or 50
Telephone Number Include Area Code:
(612) 372-5432
20 Washington Avenue South
Minneapolis, MN 55440

Cause of Discrimination Based on *(Check appropriate box(es))*

☐ RACE
☐ COLOR
☐ SEX
☐ RELIGION
☐ NATIONAL ORIGIN
☒ AGE
☐ RETALIATION
☐ OTHER *(Specify)*

Date Most Recent or Continuing Discrimination Took Place October 23, 1987

The Particulars Are *(If additional space is needed, attached extra sheet(s))*:

I. *STATEMENT OF PERSONAL HARM*: I have been employed with the above-named employer from May 2, 1966 to October 23, 1987. On January 30, 1987 I was demoted from my position of Director of Production Systems to a Senior Project Manager. On October 23, 1987, I was terminated as a result of the demotion which placed me in a position subject to elimination.

II. *EMPLOYER'S REASON FOR ADVERSE ACTION*: My employer claims the reason I was demoted is that I was not getting the job done.

III. *STATEMENT OF DISCRIMINATION*: I believe I have been discriminated against on the basis of my age, 46, in violation of the Age Discrimination in Employment Act of 1967, as amended, for the following reasons:

1. Throughout my employment my performance evaluations have always been excellent. I have been promoted many times since 1966 based on my exemplary performance.

2. In December, 1986, a performance review prepared by my direct supervisor, Second Vice President of Individual Operations, Richard Myklebust, a white male in his early 40s, was placed in my personnel file. The review (which I had not seen until I requested a copy in January, 1988, after my termination) was completely untrue and unfair. This review was contrary to all reviews I received previously. I believe the low performance rating was given only as a means for assuring my demotion and resultant termination.

3. On January 30, 1987, I was informed by Richard Myklebust that I was being removed from my position as Director of Production Systems. I was given the choice of accepting the lesser positions of either Manager of Agency Systems or a Senior Project Manager.

4. Contrary to the employer's employment policies and progressive disciplinary guidelines, at no time prior to January 30, 1987, did I receive any indication or warning, either verbal or written, that my performance was less than expected.

5. In January, 1987, at the time of my demotion, Mr. Myklebust and Hans Olsen, Assistant Vice President of Individual Operations, were aware that the position to which I was demoted most likely would be eliminated. Due to the fact that the employees over the age of 40 were earning higher salaries and had greater benefits than the employees under the age of 40, the older employees were moved into positions that would be eliminated. The individuals that replaced me are still employed and the positions they assumed were not eliminated. I was terminated on October 23, 1987 as a result of the continuing pattern of demotion and placing older employees into positions which would be eliminated by the employer.

6. My age, 46, is the reason the employer demoted me to a position that the employer knew would be eliminated in order to terminate my employment.

IV. *STATEMENT OF CLASS WIDE DISCRIMINATION ON BASIS OF AGE*: I believe that Northwestern National Life Insurance Company's treat-

ment of me is part of a general pattern and practice of discrimination against individuals over the age of 40 years by Northwestern National Life Insurance Company, and I am filing this charge on my behalf and on behalf of all other employees and former employees over the age of 40 years. Northwestern National Life Insurance Company has discriminated and continues to discriminate on the basis of age against its employees.

I declare under penalty of perjury that the foregoing is true and correct.

Date 3/31/88 /s/ [Illegible]
Charging Party

Subscribed and sworn to before me this date.

Date 3/31/88 /s/ Cheree Norris
Notary Public
Minnesota
Hennepin County

My Commission Expires Dec. 30, 1990

APPENDIX G

The Age Discrimination in Employment Act

Section 4(a) (29 U.S.C. § 623(a)) provides:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 7(b) (29 U.S.C. § 626(b)) provides:

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts

owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidate damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Section 7(d) (29 U.S.C. § 626(d)) provides:

(d) Filing of charge with Commission; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

The Fair Labor Standards Act

Section 16(b) (29 U.S.C. § 216(b)) provides:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any em-

ployee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

(2)

NO. 91-912

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOSEPH J. ULVIN, DORIS J. ANDERSON, LEO J. ANDERSON, MARJORIE L. BETTS, DONALD FEROE, WAYNE KEPLINGER and KATHERINE KOENIG,

Petitioners,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

---

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Counsel for Respondents

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QUESTION PRESENTED

I. WHETHER SIX PARTICIPANTS IN A SPECIAL VOLUNTARY EARLY RETIREMENT PROGRAM, NONE OF WHOM FILED A TIMELY CHARGE OF DISCRIMINATION, CAN RELY INSTEAD ON THE CHARGE OF A PERSON WHO WAS NOT ELIGIBLE FOR THE SPECIAL VOLUNTARY EARLY RETIREMENT PROGRAM AND WHO DID NOT MENTION THE PROGRAM IN HIS CHARGE.

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NO. 91-912

IN THE
SUPREME COURT OF THE UNITED STATES
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JOSEPH J. ULVIN, DORIS J. ANDERSON, LEO J. ANDERSON, MARJORIE L. BETTS, DONALD FEROE, WAYNE KEPLINGER and KATHERINE KOENIG,

Petitioners,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 943 F.2d 862. The opinion of the district court has not been reported.

STATEMENT

Doris Anderson elected to participate in the Special Voluntary Early Retirement Program offered by Northwestern National Life Insurance Company ("NWNL")[1] from September 14 to October 30, 1987. On October 4, 1988, Anderson filed a charge of discrimination with the Minnesota Department of Human Rights ("MDHR") which was cross-filed with the Equal Employment Opportunity Commission ("EEOC"). Respondent's Appendix at 1a. The charge alleged that Anderson was coerced into accepting early retirement. Doris Anderson then filed suit, based upon the same allegations as those contained in her charge, on November 2, 1988. Petitioners' Appendix at 27a. Anderson was joined in the suit by Joseph Ulvin, a former NWNL employee not eligible for the Special Voluntary Early Retirement Program, who was alleging that he was demoted and terminated because of his age.

---

1. Pursuant to Supreme Court Rule 29.1, the parent company and all wholly owned subsidiaries of respondent are as follows: Northwestern National Life Insurance Company is a wholly-owned subsidiary of the NWNL Companies, Inc., which is a publicly-traded company. There are no additional subsidiaries of the NWNL Companies, Inc. All subsidiaries of Northwestern National Life Insurance Company are wholly-owned except for SelectCare Health Network, Inc., a California corporation which is 50% owned by NWNL Benefits Corp., a wholly-owned subsidiary of Northwestern National Life Insurance Company, and 50% by Scripps Clinic in California.

Between November 2, 1988 and December 12, 1989, nine other former employees attempted to "opt-in" to the Anderson suit by filing Consent to Join Lawsuit forms pursuant to 29 U.S.C. § 216(b). Petitioners Leo J. Anderson, Donald Feroe, Wayne Keplinger, and Katherine Koenig were among the nine plaintiffs who opted-in during this period.

The trial court then allowed Ulvin and Anderson to send notice to present and former NWNL employees, soliciting additional participants in the lawsuit. Forty-three plaintiffs, including petitioner Marjorie L. Betts, attempted to join Anderson's suit by filing Consent to Join Lawsuit forms.

On June 22, 1990, NWNL moved for partial summary judgment dismissing the claims of twenty-four plaintiffs, including the petitioners other than Ulvin. The Honorable Paul A. Magnuson, United States District Court for the District of Minnesota, ruled that Doris Anderson's charge challenging the Special Voluntary Early Retirement Program was not timely, that no other charge had been filed by any other early retiree, and that the charge of Joseph Ulvin was not sufficient to challenge the Special Voluntary Early Retirement Program. Petitioners' Appendix at 15a-16a. Judge Magnuson therefore dismissed the claims of all early retirees.

Petitioners appealed the district court's ruling to the United States Court of Appeals for the Eighth Circuit, arguing that the district court's dismissal of their claims was contrary to the single filing rule. The Eighth Circuit affirmed both the single filing rule and the district court's dismissal of the early retirees pursuant to that rule. In affirming, the court first noted that no participant in the Special Voluntary Early Retirement Program had filed a timely charge with the EEOC challenging the program, and that the only hope for the participants in the Special Voluntary Early Retirement Program was to rely on the charge of Joseph Ulvin.

The court then noted that Ulvin had filed a timely charge alleging class-based discrimination on the basis of age by NWNL. The court examined its precedent and determined that Eighth Circuit precedent "only answered the narrow question of whether this circuit would recognize the single filing rule. The case did not address the more difficult question of whether there is any limit to the nature or type of claims opt-in plaintiffs can raise while relying upon another plaintiff's filing." Petitioners' Appendix at 6a.

The court went on to examine the specific allegations of class-wide discrimination made in Ulvin's charge and to determine whether these particular opt-in plaintiffs were within the scope of the class alleged in the charge. Applying the single filing rule to the facts of this case, the Eighth Circuit found that Ulvin's charge neither put NWNL on notice of allegations of discrimination in the Special Voluntary Early Retirement Program, nor provided a basis for the EEOC to conciliate with respect to that program. The court held, therefore, that "Ulvin's EEOC charge was too narrow to support the discrimination claims of the early retirees." Petitioner's Appendix at 7a. Petitioners now seek review by this Court of the application of the single filing rule to their individual factual situation.[2]

---

2. The Eighth Circuit opinion was filed on September 3, 1991. Petitioners filed their Petition for Writ of Certiorari on December 2, 1991, and served the Petition upon Counsel of Record by mail. The Petition, post-marked December 3, 1991 in Washington, D.C., was received by Counsel of Record on December 6, 1991. Respondent's Brief in Opposition is, therefore, required to be filed Jan. 6, 1992. Supreme Court Rule 15.2.

REASONS FOR DENYING WRIT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF SIX PARTICIPANTS OF A SPECIAL VOLUNTARY EARLY RETIREMENT PROGRAM WHO FAILED TO FILE A TIMELY CHARGE WITHIN 300 DAYS OF THE CLOSE OF THE ENROLLMENT PERIOD FOR THE PROGRAM.

A. The Eight Circuit Correctly Applied Well Established Authority to the Facts of This Case.

The Eighth Circuit followed well established authority in dismissing the petitioners' claims. After specifically recognizing the single filing rule, the Eighth Circuit went on to consider the issue presented by the Petition for Writ of Certiorari: whether these particular plaintiffs can rely on Ulvin's charge to sustain their early retirement claims, having failed in their attempt to sue NWNL based upon the untimely charge of early retiree Doris Anderson.[3]

---

3. Doris Anderson's untimely charge specifically mentions the early retirement program and is based upon the claimed discrimination allegedly involved in that program. Respondent's Appendix at 1a. It was not until Doris Anderson filed her charge that the EEOC and NWNL were first put on notice that any participant in that voluntary program was alleging that the program was not truly voluntary. Anderson's charge did encompass the early retirees. *Kloos*, 799 F.2d at 400. Anderson's charge, however, was not timely. 29 U.S.C. § 626(d), 633(b); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Wilson v. Westinghouse Electrical Corp.*, 838 F.2d 286 (8th Cir. 1988); *Ulvin v. Northwestern National Life Insurance Company*, 943 F.2d 862 (8th Cir. 1991).

The Eighth Circuit correctly set forth the standard in all circuits for scope of a charge. The court stated:

> We stated in *Kloos* that the administrative filing requirement serves two important purposes. It gives the EEOC an opportunity to eliminate unlawful practices through informal conciliation and it provides employers with formal notice of the charges being brought against them. Keeping these purposes in mind, there must be some limit to what claims an opt-in party can raise when relying on the administrative filing of another. Certainly, when the filed charge is quite specific as to the scope of the class claim it raises, opt-in plaintiffs should not be permitted to raise claims that are far outside of that scope. Otherwise, the purposes of requiring an administrative filing would be thwarted; the EEOC would not be able to achieve any meaningful conciliation and employers would not be on notice as to the nature of the potential claims of opt-in plaintiffs.

Petitioner's Appendix at 6a-7a.

The court then made a specific factual analysis of the charge and the early retirees to determine if the early retirees were within the scope of the charge. The Eighth Circuit decided that these particular plaintiffs are not within the scope of the charge brought by Ulvin. The court stated:

> Here, Ulvin's charge complained only that Northwestern demoted and subsequently fired him because of age. Nowhere in the charge did Ulvin mention Northwestern's early retirement program, or that Northwestern was coercing older employees into accepting early retirement. Ulvin was not eligible to participate in Northwestern's early retirement

> program. Northwestern terminated Ulvin seven days before the deadline for potential early retirees to announce their decision whether or not to retire. No early retirees filed a complaint with the EEOC until September 30, 1988, almost one year after the deadline for selecting early retirement had passed. Thus, Ulvin's EEOC charge did not alert Northwestern to the claims of the early retirees, nor did it create the possibility that the EEOC or Northwestern would attempt to conciliate the claims of early retirees.
>
> Ulvin's EEOC charge was too narrow to support the discrimination claims of the early retirees. For this reason, we affirm the district court's decision to dismiss Doris Anderson and the other five early retirees from Ulvin's class action.

Petitioner's Appendix at 7a. The Eighth Circuit correctly followed precedent in all circuits in making that ruling.

To file a civil suit under the ADEA, a private plaintiff must first file an administrative charge with the EEOC. 29 U.S.C. § 626(d), 633(b). The general rule is that a charge filed with the EEOC by a representative plaintiff will satisfy the notice requirement for others similarly situated, if the charge alleges discrimination of a class-wide nature and the charge fulfills the purposes of agency notice with respect to the persons attempting to rely on the charge. *See, e.g., Kloos v. Carter-Day Company*, 799 F.2d 397 (8th Cir. 1986). Plaintiffs may raise in court only those claims that are "like or related to" the substance of the complainant's charge before the EEOC. *Satz v. ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980).

The purpose of the notice requirement is two-fold: 1) to provide the EEOC an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation; and 2) to provide formal notice to the employer of the charges that have been made against it. *Kloos*, 799 F.2d at 400. *See also Boyd v. Ozark Airlines*, 568 F.2d 50, 54 n.5 (8th Cir. 1977) (a class action may be maintained if the named plaintiff's charge gives the defendant an opportunity for conciliation with respect to the issues raised in court). As the Eighth Circuit recognized, Ulvin's charge fulfilled neither of these purposes with respect to the Special Voluntary Early Retirement Program. Nothing in the charge alerted either the EEOC or NWNL that Ulvin was attempting to allege that a voluntary program for which he was not even eligible was discriminatory.

Ulvin's EEOC charge challenged his reassignment and subsequent termination, alleging that his treatment was part of a pattern or practice of discrimination on the basis of age at NWNL. Joseph Ulvin's charge does not mention early retirement. Ulvin was not even eligible for the early retirement program. Ulvin identifies the date for the discrimination as October 23, 1987, a date which is before the Special Voluntary Early Retirement Program participants were required to elect whether to participate in the program. At the time NWNL received Ulvin's charge, no one eligible for the Special Voluntary Early Retirement Program had complained of alleged discrimination in the program, nor did Ulvin make that complaint. Ulvin's notice neither gave the EEOC a reasonable opportunity to resolve any discrimination claims related to the Special Voluntary Early Retirement Program by informal means, nor did it afford NWNL adequate notice of the conduct alleged to be discriminatory. Ulvin's charge, therefore, did not encompass the early retirees. *Kloos*, 799 F.2d at 400.

B. No Conflict Exists Among the Circuits On the Issue Addressed by the Eighth Circuit.

Each circuit that has addressed the issue has adopted the single filing rule, agreeing that a single charge may be the basis of a class claim. The Eighth Circuit accepted the single filing rule in this case. The circuits also agree that limits apply to the claims that can be raised relying on a particular class based charge. None of those circuits has issued a ruling inconsistent with the Eighth Circuit's decision that these particular plaintiffs are not within the scope of the class alleged.

The primary authority relied upon by petitioners in their unsuccessful effort to create the appearance of a conflict between the Circuits is *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990). In *Tolliver*, the Second Circuit faced the issue of whether the single filing rule was available to plaintiffs filing individual actions after having been dismissed from a representative action when the class was decertified. The court found that plaintiffs could benefit from the single filing rule without joining an existing representative action. The court then addressed the issue of whether the charges in that case were appropriate for invoking the single filing rule. Following *Kloos*, the court found that the charges were appropriate since each alleged that Xerox discriminated against persons over the age of forty (40), in the same way, as a class. The court was not faced with the issue of whether the particular plaintiffs were within the scope of the charge, since all were terminated as part of the extensive reduction in force challenged in the charges. The court determined only that the single filing rule applied to individual plaintiffs not joining a representative action, and that these charges notified Xerox that a class of persons including the plaintiffs was affected.

The Eighth Circuit's reasoning comports precisely with that of the Second Circuit. The Second Circuit stated that "In assessing the adequacy of a charge for purposes of the single filing rule, the question is whether it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges." *Tolliver*, 918 F.2d at 1058 (citation omitted). The court found in that particular factual situation that it would be wasteful to "flood the EEOC with repetitive notices . . . all making the same claim already lodged with the Commission as a classwide grievance by the *Lusardi* named plaintiffs." *Tolliver*, 918 F.2d at 1059.

In this case, the Eighth Circuit found that a conciliatory purpose would be served by the filing of a separate EEOC charge, since the EEOC and NWNL could not conciliate regarding a voluntary program for which Ulvin was not eligible based upon Ulvin's charge. Repetitive notices were not required by the Eighth Circuit. All that was required is what actually occurred: the filing of one charge by Ulvin on behalf of persons terminated in the reduction in force and one charge by Doris Anderson on behalf of the participants in the Special Voluntary Early Retirement Program. That Anderson's charge was not timely filed does not alter the fact that it was necessary to file the charge.

None of the other cases cited by petitioners conflict with the rule in the Second and Eighth Circuits. None of those courts faced the issue of whether a particular group of plaintiffs were within the scope of the class alleged in the charge. In *Bean v. Crocker National Bank*, 600 F.2d 754 (9th Cir. 1990); *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988); and *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980), the courts found that the charges were appropriate for use of the single filing rule because the charges alleged class based discrimination. In each case the parties seeking to rely on the charge clearly fit within the

scope of the class alleged. There was no issue in either case of whether particular plaintiffs were within the scope of the class alleged. In *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), the court found the charge inappropriate for use of the single filing rule because the charge alleged only individual, not class, discrimination. No issue of the scope of the class alleged was presented, because no class was alleged.

The determination of whether particular plaintiffs can properly rely on a class based charge is a fact specific determination not appropriate for review under this Court's certiorari jurisdiction. There is no general overriding principle which this Court could prescribe for such cases. This case does not present any important issue not previously addressed by this Court, as petitioners try to suggest. This case presents only a specific factual determination of whether these particular plaintiffs are within the class alleged by Ulvin's charge. This specific factual determination is reached based on well settled law in all the Circuits. This case does not present an opportunity for this Court to adopt a broad principle to apply to more than the parties involved in this case.[4]

---

4. Petitioner's attempt to create an issue regarding alleged confusion among the courts as to the applicability of Rule 23 to representative actions under the ADEA. Such an issue is not presented on this record as the Eighth Circuit neither referred to nor relied on Rule 23. Further, the result in this case is the same under Rule 23 precedent as under ADEA precedent. In *General Telephone Company v. Falcon*, 457 U.S. 147, 157-158, 72 L. Ed. 2d 740, 750, 102 S.Ct. 2364 (1982), this Court noted that individual allegations of discrimination do not establish either that a policy of discrimination by a company exists, or that any one individual's claim will share common questions of law or fact with another individual's claim. Further, a representative plaintiff

(continued...)

C. The Eighth Circuit Decision Is Also Consistent with Congressional Intent.

The cases regarding the single filing rule balance the important Congressional purpose for requiring a charge with the right of plaintiffs to take collective action against their employer. As the Eighth Circuit stated, the charge requirement is important, giving the EEOC the opportunity to obtain compliance with the ADEA by informal means, and informing the employer of the practices and policies which allegedly discriminate. All circuits recognize the importance of the charge requirement. *See, e.g., Vance v. Whirlpool Corp.*, 707 F.2d 483, 487 (4th Cir. 1983), *supp. op.* 716 F.2d 1010 (1983), *cert. denied* 465 U.S. 1102 and 467 U.S. 1226 (1984); *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983). *See also Gilmer v. Interstate/Johnson Lane*, 500 U.S. ___, 115 S. Ct. 1647 (1991).

Congress also considered the charge requirement important to the purpose of the ADEA. When the language of the ADEA was changed so that a charge must be brought, rather than an individual file notice of intent to sue, Congress indicated that:

> This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to

---

4.(...continued)
can only represent other plaintiffs if the other plaintiffs' claims present issues that the representative plaintiff has standing to raise. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968); *Briggs v. Anderson*, 796 F.2d 1009, 1018 (8th Cir. 1986).

> eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., *reprinted in 1978 U.S. Code Cong. & Admin. News* 504, 528, 534.

The Eighth Circuit opinion complies precisely with this Congressional mandate. Ulvin's charge does not even generally describe the Special Voluntary Early Retirement Program, or any alleged discrimination other than position eliminations. The Eighth Circuit decision gives effect both to the rule that every individual plaintiff need not file her own charge, and to the important purpose of requiring a charge. That decision is well reasoned, and based on existing precedent in all circuits. That decision does not present any basis upon which the Court should grant certiorari.

II. THE ISSUES IDENTIFIED IN THE PETITION ARE NOT PRESENT IN THIS CASE.

Petitioners attempt to raise two issues which are not, in fact, present. Petitioners argue that the relationship of Rule 23 to an ADEA representative action and the effect of court approved notice on persons opting into an ADEA action are both at issue. Neither issue is present in this case. The Eighth Circuit did not rely upon Rule 23 in its opinion. No issue as to the proper membership of an ADEA class or the applicability of Rule 23 requirements to such a class, was presented to the Eighth Circuit. Petitioners' argument regarding the alleged confusion in the courts with respect to the applicability of Rule 23 requirements, while it may be academically interesting, is not relevant to a determination of

whether to grant certiorari in the case actually before this Court.

Petitioners also claim that court-approved notice was sent in this action, and that petitioners attempted to opt-in to the litigation in response to that notice, which should allow them to rely on Ulvin's charge. This factual situation, however, is not before the Court. Only petitioner Majorie L. Betts opted-in to the action after receiving notice. All of the other petitioners opted-in to the action before any notice was sent. Further, petitioners did not raise below any issue with respect to the court-approved notice and its possible effect on the ability of these petitioners to rely on Ulvin's charge. The issue of court-approved notice is, therefore, not raised on this record.

Even were the issue present, however, court-approved notice is irrelevant to any issue in this proceeding. In *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), this Court decided that a district court could play a role in prescribing the terms and conditions of notice to potential members of a class. The Court did not decide anything with respect to the substantive charges of the plaintiffs in that case. The fact that the court may approve the terms of a notice sent by a representative plaintiff to potential opt-in plaintiffs does not have any bearing on the validity of the claims of persons responding to that notice. The second question presented by petitioners, therefore, is also not present. These petitioners were primarily already involved in the case before the notice was sent, and even had these petitioners all responded to a court-approved notice, that fact is irrelevant to any determination of the validity of their claims.

CONCLUSION

For these reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: 1-6, 1992

Respectfully submitted,

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APPENDIX

CHARGE OF DISCRIMINATION

EEOC 265890003

MINNESOTA DEPARTMENT OF HUMAN RIGHTS
UNDER CHAPTER 363
AND EEOC

Ms. Doris Anderson
(612) 824-5411
5536 Colfax Avenue South
Minneapolis, MN 55419
Hennepin County

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME

Name Northwestern National Life Ins. Co.
No. of Employees/Members In excess of 50
Telephone Number Include Area Code:
(612) 372-5432
20 Washington Avenue South
Minneapolis, MN 55440

Cause of Discrimination Based on *(Check appropriate box(es))*

- ☐ RACE
- ☐ COLOR
- ☐ SEX
- ☐ RELIGION
- ☐ NATIONAL ORIGIN
- ☒ AGE
- ☐ RETALIATION
- ☐ OTHER (Specify)

Date Most Recent or Continuing Discrimination Took Place February 29, 1988

The Particulars Are *(If additional space is needed, attached extra sheet(s)):*

I. *STATEMENT OF PERSONAL HARM*: I was employed by the above-named employer from November 5, 1956, until February 29, 1988. From, 1956 to 1975, I worked in numerous clerk positions. From 1975 to 1978, I worked as a Medical life Underwriter. From 1978 until my retirement, I worked as a Programmer Analyst. Starting in February 1987, the company began pressuring me to take early retirement by downgrading my job responsibilities, implying that I may be laid off if I did not take early retirement. I believe I was pressured into early retirement because of my age.

II. *EMPLOYER'S REASON FOR ADVERSE ACTION*: My -employer claims the early retirement program was not discriminatory.

III. *STATEMENT OF DISCRIMINATION*: I believe I have been discriminated against on the basis of my age, 59, in violation of the Age Discrimination in Employment Act of 1967, as amended, for the following reasons:

1. Throughout my employment, my performance evaluations have always been very good. I consistently received merit increases and promotions based on my performance.

2. In February of 1987, I received an early retirement offer. Although the benefits were good, they did not approach my salary and I turned down the offer. I later learned from my former supervisor, Joseph Ulvin, that I had been on a "hit list" of older employees that the company wanted to terminate in some manner.

3. I was the oldest Programmer analyst in my unit and department. My unit manager was a woman in her early 40s. All of the other Programmers (about 7 plus 2 contract employees) were under 40. Although I had been a programmer since 1978, I received the least interesting and challenging programming projects. Toward the end of my employment, I was primarily given short projects and maintenance work. Even though I was not given the opportunity to work up to my full potential, other, younger employees were being brought into the department to do work I could have done.

4. In the fall of 1987, Northwestern National Life Insurance Co. purchased a computer software package to replace and interface with the old system. Many meetings were held with the programmers in my unit to discuss interfacing the two systems. I was the only experienced programmer consistently excluded from those meetings. I knew that my exclusion from those meetings made me more vulnerable to lay offs or reductions in the work force because I would be the least familiar with the new program.

5. In the Fall of 1987, I was again offered early retirement as part of an offer extended to many of the older employees. Many of the older employees believed that if they did not accept early retirement, they would be laid off regardless of seniority. The Company sponsored seminars on how to cope with sudden unemployment and a subsequent job search. The consultant also discussed how we would cope with not taking early retirement and possibly being laid off anyway.

6. The company offered early retirement to employees over the age of 50 and pressured them to take it because those employees were earning higher salaries and had greater benefits than the younger employees. The company put pressure on employees over 50 to take the early retirement by giving them notice that a reduction in force would soon be necessary. Other employees who were not over the age of 50 but were over the age

of 40, were also forced out of the company through terminations and reductions in force.

7. I agreed to take early retirement because I thought that because of my age I would be laid off or terminated if I did not retire. My last date of employment was February 29, 1988.

8. Based on the above allegations it is my contention that my age, 59, is the reason the employer downgraded my positions, by passed me for promotion, and terminated my employment by forcing me to accept early retirement.

IV. *STATEMENT OF CLASS WIDE DISCRIMINATION ON THE BASIS OF AGE*: I believe that Northwestern National Life Insurance Company's treatment of me is part of a general pattern and practice of discrimination against individuals over the age of 40 by Northwestern National Life Insurance Company, and I am filing this charge in my behalf and on behalf of all other employees over the age of 40. Northwestern National Life Insurance Company has discriminated and continues to discriminate on the basis of age against its employees.

I declare under penalty of perjury that the foregoing is true and correct.

Date 9/30/88

/s/ Doris J. Anderson
Charging Party

Subscribed and sworn to before me this date.

Date 9/30/88

/s/ Jean Boler
Notary Public
Minnesota
Hennepin County

My Commission Expires
July 20, 1994

FILED
JAN 17 1992
OFFICE OF THE CLERK

(3)

No. 91-912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH J. ULVIN, DORIS J. ANDERSON, LEO J. ANDERSON, MARJORIE L. BETTS, DONALD FEROE, WAYNE KEPLINGER and KATHERINE KOENIG,

Petitioners,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY BRIEF

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LIST OF ALL PARTIES TO PROCEEDINGS PURSUANT TO RULE 29.1

The following parties were appellants below but are not participating in this proceeding:

Lloyd J. Anderson, William D. Barabas, Marlys Allen, Cora Ann Bird, Clinton A. Carlson, Earnestine Collins, Mary B. Devine, Roger Dixon, Helen Duffy, Elaine L. Flynn, Joyce L. French, Joseph H. Gruber, Pat M. Haugen, Mary Hightower, Delores Iverson, Leonard W. Jackson, Jr., Arthur Janota, Bonnie Johnson, Ronald A. Jones, Marilyn J. King, Otistine Koontzy, Thomas E. Lafond, Karla K. Larson, David N. Lawrence, Linda M. Levin a/k/a Linda Levin Thomas, Julie Lozano, Renee M. McCarthy, Joan M. Mirovsky, Linda J. Napier, Flordeliza V. Parayno, Noreine D. Philbin, John Richard Potasnak, Cynthia Rataj, Richard Regis, Carl W. Rettenmayer, David L. Roberts, Myron George Sandefur, James Thomas Scannell, Sharon Ruth Stewart, James T. Szczech, Kamal Tandon, Sheldon L. Thorkelson, Jessica Waukazo, James Stanley Welman, Steven G. Williams, Erdine L. Wolf, as personal representative for the estate of Karl Wolf, deceased, Karen Young.

Respondent Northwestern National Life Insurance Company is the only corporation involved in this proceeding. The parent company and all not wholly-owned subsidiaries of Respondent are as follows:

Northwestern National Life Insurance Company is a wholly-owned subsidiary of the NWNL Companies, Inc., which is a publicly-traded company. There are no additional subsidiaries of the NWNL Companies, Inc. All subsidiaries of Northwestern National Life Insurance Company are wholly-owned except for SelectCare Health Network, Inc., a California corporation which is 50% owned by NWNL Benefits Corp., a wholly-owned subsidiary of Northwestern National Life Insurance Company, and 50% by Scripps Clinic in California.

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IN THE

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JOSEPH J. ULVIN, DORIS J. ANDERSON, LEO J. ANDERSON, MARJORIE L. BETTS, DONALD FEROE, WAYNE KEPLINGER and KATHERINE KOENIG,

Petitioners,

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY BRIEF

ARGUMENT

The Petitioners have previously addressed the reasons for granting a writ of certiorari in this case and will not reiterate in full their position here. However, in its Opposition, Respondent Northwestern National Life Insurance Company ("NWNL") has mischaracterized the issue presented and the breadth of holding in *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 1641, 113 L. Ed. 2d 736 (1991)

(Respondent's Brief, p. 9), the key decision which is at odds with the Eighth Circuit's decision below.

The holding in *Tolliver* is simple:[1] individuals who had been forced to retire and who had not filed timely charges of age discrimination were allowed to rely upon a timely charge filed by a former employee who had been fired. *Id.*, at 1058. Respondent's reasoning in this case precisely matches that of the district court in *Tolliver*, is erroneous both in law and policy for the same reasons, and was rejected by the Second Circuit. *Id.*; *Tolliver v. Xerox Corp.*, No. 89-887L, slip op. at 14 (W.D.N.Y. February 14, 1990) (Reply Brief App. p. 14a). The Second Circuit's reasoning, if applied in Petitioners' case, would result in a reversal of the Eighth Circuit's decision below.

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[1] Nineteen named individual plaintiffs filed separate actions (later consolidated under the caption *Tolliver v. Xerox Corp.*) alleging discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* All were former employees of Xerox Corporation. Some of the plaintiffs had been terminated through voluntary retirements; others had been terminated through involuntary reductions-in-force. All of the terminations occurred between November 1, 1981, and July 11, 1983. None of the *Tolliver* plaintiffs had individually filed a charge of unlawful discrimination with the EEOC within the 300-day peirod required by 29 U.S.C. § 626(d)(2). They were allowed to rely on a timely charge filed by a plaintiff in another case from which they had been excluded, *i.e.*, *Lusardi v. Xerox Corp.*, 118 F. Supp. 351, 379 (D.N.J. 1987). *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1058.

The district court in *Tolliver* ruled that the nineteen plaintiffs—some of whom accepted early retirement—were not similarly situated to Lusardi—who was fired—and so could not piggyback their charges onto his timely charge. *Tolliver v. Xerox Corp.*, No. 89-887L, slip op. at 14 (W.D.N.Y. Feb. 14, 1990) (Reply Brief App. 14a). The district court in *Lusardi* had previously reached the same result. *Lusardi v. Xerox Corp.*, *supra*, 118 F. Supp. at 379. The same plaintiffs were subsequently allowed to piggyback on that same charge by the Second Circuit when it reversed the district court. *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1058.

Respondent is correct only in its assertion that the Second Circuit in *Tolliver* found the single filing rule applied because the underlying charge "alleged that Xerox discriminated against persons over the age of forty (40), *in the same way, as a class.*" Respondent's Brief, p. 9 (emphasis added). That is the very same allegation made in the charge at issue here.

Additionally, NWNL's assertion that (1) the distinction between a collective action under the ADEA and a Fed. R. Civ. P. Rule 23 class action, and (2) the effect of court-approved notice, are not at issue in this case requires a further response.

With respect to the Rule 23 distinction, Petitioners' central point is that the Eighth Circuit too narrowly construed the "similarly situated" requirement because it viewed the charging party as a Rule 23 class representative. This led the court to apply what was, in effect, a standing analysis on Petitioners *vis-a-vis* the claims of the opt-ins.

An ADEA charging party is not a representative of absent class members, however. As long as he or she is in a situation similar to that of the opt-ins, the latter are entitled to participate in the litigation by filing consents. Where all assert that they were forced out of their jobs as part of a comprehensive reduction-in-force, the similarity of circumstances cannot be gainsaid. It is important that this Court disabuse employers of the notion that the standing approach to Rule 23 can be imported to ADEA cases.

Second, the effect of the court-approved notice in this case, and in ADEA cases generally, must be clarified. This Court has recognized the importance of court-approved notice in ADEA actions. Trial courts have been directed to "monitor[] preparation and distribution of the notice . . . [to] ensure that [the notice] is timely, accurate, and informative. . . . This procedure may avoid

the need to cancel consents obtained in an improper manner." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989).

As part of monitoring the distribution of the notice, the trial court determines who is entitled to receive the notice, *i.e.*, those persons who are similarly situated to the named plaintiffs. If this initial determination has no legal significance, courts will not be constrained from revoking invitations to employees to join in an ADEA lawsuit. Apart from its impact on individuals, the inefficiency of such a procedure is contrary to the express directive and implicit objectives of this Court's decision in *Sperling*. The inefficiency and inequities that flow from the present confusion [2] concerning the significance of an ADEA notice require a resolution of this issue by this Court.

---

[2] Decisions of lower courts reflect confusion on the issue of the effect of an ADEA notice. Some have ruled that notice should not be sent to persons not similarly situated to the named plaintiffs. *See, e.g., Johnson v. American Airlines, Inc.*, 531 F. Supp. 957, 961 (N.D. Tex. 1982). Others have ruled that once a person has opted into an ADEA collective action, a trial court must exercise particular care in making determinations which effectively exclude that person from the lawsuit. *See, e.g., Woodall v. Drake Hotel, Inc.*, 913 F.2d 447, 451 (7th Cir. 1990).

It is for this reason that some have held that courts should determine who is similarly situated and thus eligible to opt into the lawsuit before notice is issued. *See, e.g., Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 443 (N.D. Ill. 1982); *Johnson v. American Airlines, Inc.*, *supra*, 531 F. Supp. at 961. Other courts have ruled that such a determination should occur only when a person attempts to opt into the lawsuit. *Frank v. Capital Cities Communications, Inc.*, 509 F. Supp. 1352 (S.D.N.Y. 1981).

CONCLUSION

For the reasons stated here and in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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January 1992

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. 89-679L

AARON ALESZCZYK, AS EXECUTOR OF THE ESTATE OF RONALD F. ALESZCZYK, DECEASED,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-889L

JOHN BENNETT,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-957L

WILLIAM BRANT,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1385L

PAUL F. BRAUN,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-955L

JAMES CARROLL,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1002L

JAMES DAMMEN,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1003L

CHARLES DOLCIMASCOLO,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-889L

HELEN A. FORDHAM,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1051L

JOSEPH GOLOSSI,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1156L

PAUL J. MITTAK,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1053L

ALFONSE OLIVERI,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-914L

WALTER L. PIDEK,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1087L

ALFRED E. RIZZARI,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-890L

DONALD SCHAEFER,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-1052L

HAROLD SIEBERT,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-887L

PETER N. TOLLIVER,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-956L

LAWRENCE L. TRAVIS,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-915L

RICHARD B. VAN MAAREN,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

Civ. 89-888L

LEON A. WIATER,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

DECISION AND ORDER

INTRODUCTION

These cases involve allegations of discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Plaintiffs are all former employees of defendant Xerox Corporation, having been terminated from their positions by means of voluntary (VRIF) and involuntary (IRIV) reductions in force between 1981-1983. Defendant has moved to dismiss a total of 19 different suits brought individually alleging ADEA violations. Because the principal bases for defendant's motions to dismiss are the same in all cases—the failure of all plaintiffs to timely file an administrative claim with the EEOC—I have joined the cases for argument and decision of the motions. Two of the plaintiffs, the Estate of Ronald Aleszczyk (hereinafter "Aleszczyk") and Paul F. Braun, have raised separate issues not germane to the other plaintiffs and those issues will be treated here as well.

I. FACTS

A. General Background Concerning All Parties.

All 19 plaintiffs allege that they were terminated from Xerox between November 1, 1981 and July 11, 1983 as part of IRIF and VRIF programs at Xerox.

None of the plaintiffs filed individual lawsuits alleging age discrimination until the instant suits were commenced in the Western District of New York in 1989. None of the plaintiffs individually filed a charge of unlawful discrimination with the EEOC within the 300-day period required by the statute, 29 U.S.C. § 626(d)(2).

Fifteen of the plaintiffs eventually filed claims with the EEOC; 4 have never filed such a claim. Of the 15 who

did file, the dates of filing range from 392 days after the alleged discriminatory act (plaintiff Bennett) to 2,655 days thereafter (plaintiff Schaefer). Nine plaintiffs filed more than 2,000 days after the alleged discriminatory act.

On or about March 8, 1983, four representative plaintiffs (none of the plaintiffs here) commenced a class action against Xerox alleging age discrimination in the United States District Court for New Jersey. This action, entitled *Lusardia, et al v. Xerox Corporation* (*"Lusardi"*), was conditionally certified as a class action on or about January 31, 1984. Eventually approximately 1,312 individuals, including all 19 plaintiffs before me, filed written consents to "opt in" to the New Jersey case as class members. All 19 of these plaintiffs opted in to the *Lusardi* action during the 6-month period from November 26, 1983 to May 8, 1984.

The class was decertified 3 years alter, after extensive discovery concerning 51 sample plaintiffs, by United States District Judg Alfred J. Lechner, Jr. on November 5, 1987. *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987.

The Third Circuit declined to exercise jurisdiction over the appeal, but the Court did issue an order of mandamus directing Judge Lechner to reconsider his decertification decision. The Third Circuit determined that it was error for Judge Lechner to have relied in part on the fact that many class members had not timely filed EEOC claims in determining whether the case should be maintained as a class action. The Court held that unnamed class members could rely on the timely filing of EEOC charges by the named representative plaintiffs and that the class members would not be barred from participating in the class action because of their individual failure to file. *See Lusardi v. Lechner*, 855 F.2d 1062, 1077-78 (3rd Cir. 1988).

On remand, Judge Lechner reaffirmed his decision to decertify the class because he determined that the mem-

bers of the proposed class were not similarly situated and that therefore, a class action was inappropriate.

As part of the decertification notice, the district court advised class members that for purposes of commencing individual age discrimination claims, the statute of limitations would be tolled until December 23, 1988. This notice made no specific reference to the 300-day administrative filing requirement.

B. Plaintiff Aleszcyk

Ronald Aleszczyk was employed by defendant Xerox from 1963 until his August 1982 VRIF termination. Plaintiff was 42 years old at the time of his termination, and held the position of Senior Project Engineer—Mechanical.

On March 30, 1984, Aleszczyk filed his written consent to opt in to the *Lusardi* class action. On May 14, 1984, subsequent to his opting in to *Lusardi*, plaintiff filed an administrative charge with the EEOC alleging age discrimination in violation of ADEA. Aleszczyk filed this charge nearly two years after his termination.

Plaintiff in his second cause of action alleges that in June of 1984 Xerox unlawfully retaliated against him for joining the class action and filing with the EEOC. Essentially, plaintiff alleges that Xerox refused to rehire him on a contract basis because of his prior actions. Plaintiff timely filed a charge alleging this violation of EDEA with the EEOC on August 3, 1984.

Finally, as a third cause of action, Aleszczyk contends that Xerox terminated him in 1982 for discriminatory reasons based on his status as a disabled veteran. Although no statutory basis for this claim is cited in the complaint, plaintiff subsequently claimed in his motion papers that Xerox had violated the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) and the regulations set forth in 41 CFR § 60-250.4 *et seq.*

Plaintiff filed the complaint alleging these three claims on June 9, 1989.

C. Plaintiff Braun

In his complaint filed October 20, 1989, Braun alleges ADEA violations against defendant Xerox on the basis of facts similar to those underlying plaintiff Aleszczyk's complaint. Braun maintains that his August 15, 1982 termination from his position as a Senior Component Engineer & Technical Special—Component Engineering, as part of an "involuntary reduction in force" (IRIF) program, was discriminatorily motivated. At the time of his termination, plaintiff Braun was 50 years old.

Like Aleszczyk, Braun opted in to the *Lusardi*, action, on May 7, 1984. Unlike Aleszczyk, however, Braun never filed an administrative charge with the EEOC. Braun contends that on or about May 18, 1983, he attempted to file with the agency, but failed because the EEOC never remitted to him the appropriate materials and forms. After opting in to *Lusardi*, plaintiff again tried to file a claim, only to have the EEOC refuse to accept his claim apparently because he was a member of the class in *Lusardi*.

Braun also alleges that the decision to terminate him was based on his medical handicaps, consisting of arthritis and a blood disorder, which he contends had no adverse affect on his performance. Thus, plaintiff claims that defendant also has violated the Rehabilitation Act of 1973.

Braun's third claim is grounded in common law fraud. He points to an April 1982 statement made by Xerox to a funding company, to which plaintiff had applied for a mortgage, that the outlook for plaintiff's continued employment at Xerox was "good." Plaintiff alleges that he relied on this statement to his detriment in entering into the mortgage agreement, and was subsequently damaged by his August termination.

II. DEFENDANT'S MOTIONS

Xerox has moved to dismiss, or in the alternative for summary judgment, in all the actions, on all claims. Plaintiffs Braun and Aleszczyk have cross moved for summary judgment.

A. ADEA claims

Defendant's motion, at first blush, is deceptively simple. Xerox argues that none of the 19 plaintiffs involved in this action filed an administrative charge with the EEOC alleging age discrimination within 300 days of the allegedly discriminatory acts, as mandated by 29 U.S.C. § 626 (d). Section 626(d)(2) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [Equal Employment Opportunity Commission]. Such a charge shall be filed . . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Because plaintiffs failed to comply with this statutory prerequisite to suit in federal court, maintains defendant, this court must dismiss these actions as a matter of law.

Were it not for the complicating effect of the *Lusardi* class action, this decision would fill but a page or two. The 300-day EEOC filing requirement operates as a statute of limitations, compliance with which is mandatory and rigorously enforced. *See Shockley v. Vermont State Colleges*, 793 F.2d 478, 481 (2d Cir. 1986); *Miller v. ITT*, 755 F.2d 20 (2d Cir. 1985); *Foster v. CBS Records*, 109 F.R.D. 168 (S.D.N.Y. 1986).

In class actions there is an exception to this requirement. *Lusardi* and other cases have recognized that each

member of a valid class action need not have complied with the 300-day filing requirement mandated by § 626 (d) (2) as long as the representative members of the class had timely filed a claim in full compliance with § 626. The class members can "piggyback" on the timely EEOC filing for purposes of the class action.

The issue before me then is this: should former opt-ins to a conditional, and ultimately decertified, class be permitted to "piggyback" on the timely EEOC filing of the named plaintiff for the purpose of proceeding with their subsequent individual claims? On the facts of this case, the court is compelled to answer this question in the negative.

In actions for age discrimination, the 300-day EEOC filing requirement is a rigid, strictly adhered-to statutory prerequisite to the filing of a complaint. It must be recognized that "[l]imitations provisions are as much a part of Congressional intent as the creation of the cause of action." *Foster, supra*, 109 F.R.D. at 171. Although plaintiffs argue strenuously that "fairness" requires that I accord paramount importance to Congress' intent to grant broad relief in matters of age discrimination, it would be erroneous, especially on the facts of this case, to ignore Congress' equally well-expressed intention to bar suits brought on the basis of accusations of discriminatory motive which are leveled years after the adverse employment decision has been made. *See Foster*, 109 F.R.D. at 170.

Courts historically have excused plaintiffs of their administrative filing obligations only in narrowly defined, exceptional circumstances. Most commonly, the time period has been extended where there is evidence that an employer, through some wrongful act, has caused a plaintiff's failure to file timely. The doctrines of "equitable tolling" and equitable estoppel only apply where the facts show that an employer somehow either fraudulently concealed the existence of a cause of action or

wrongfully prevented a terminated employee from exercising his rights. *See Cerbone v. ILGWU*, 768 F.2d 45, 48-49 (2d Cir. 1985); *O'Malley v. GTE Service Corp.*, 758 F.2d 818, 822 (2d Cir. 1985).[1]

Plaintiffs have made no such showing here. To the contrary, evidence in the record indicates that Xerox complied fully with its statutory and regulatory obligation to post in the workplace written notices informing employees of their rights and obligations under ADEA. *See* Affid. of John Kepnar, sworn to on October 11, 1989, at p. 7; 29 U.S.C. § 627.

Plaintiff Aleszczyk's contention that Xerox never personally counselled him or advised him of his rights under federal law in no way affects the analysis; aside from the posting obligation, "[t]here is no statutory requirement that an employer inform individual employees of their rights under the ADEA." *Seedman v. Alexander's, Inc.*, 683 F.Supp. 924, 927 (S.D.N.Y. 1987).

It cannot seriously be argued that the plaintiffs in this case in any way *relied* on the filing of the *Lusardi* case in declining to file their own charges with the EEOC within the requisite 300 days. The record reveals that 18 of the 19 plaintiffs before me opted in to that action more than, and in most cases *many* more than 300 days after the alleged discriminatory acts.[2] For example,

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[1] Regarding the statutory requirement under Title VII that a plaintiff bring a civil action within 90 days of receipt of a right-to-sue letter, the Court of Appeals has said "in the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." *Johnson v. AL Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984), quoting *Rice v. New England College*, 676 F.2d 9, 11 (1st Cir. 1982).

[2] The parties concede that plaintiff Oliveri filed his consent to opt in to *Lussardi* within 300 days of his termination. Nevertheless, the court is compelled to dismiss his claim along with the others because in responding to defendant's motion he has failed to come forth with any proof, other than his own complaint, that he ever

plaintiff Helen Fordham apparently filed her written consent to join *Lusardi* 880 days subsequent to her termination. It strains credulity to suppose that this plaintiff deferred acting because she relied on the filing of Mr. Lusardi, of whose lawsuit she would not become aware for 2½ years after her termination.

In sum, plaintiffs have presented no reason why this court should depart from enforcing the rigid 300-day EEOC filing requirement imposed by ADEA. The doctrines of equitable tolling or estoppel do not apply on the instant facts, and plaintiffs cannot show that they relied in any way on the actions of the representative plaintiffs in the *Lusardi* class action.

Nevertheless, the anomalous result remains that, if these plaintiffs had been allowed to proceed as a class in the *Lusardi* action, the filing by the named plaintiff *would* have sufficed to fulfill the requirement for all unnamed class members. Why should the mere fact that the class was eventually decertified then summarily deprive the former opt-ins of their right to "piggyback" on the EEOC filings of others?

The answer lies in the rationale behind the EEOC filing requirement as it relates to the circumstances of a class action. Aside from serving to bar stale and tardy claims, the filing requirement operates to notify the EEOC and the defendant of the plaintiff's allegations, thus enabling the EEOC to perform its conciliatory function, which in turn is intended to reduce litigation. *See Anderson v. Montgomery Ward & Co.*, 631 F.Supp. 1546, 1548 (N.D. Ill. 1986).

Courts have long recognized that unnamed class members may "piggyback" on the filing of the named plain-

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filed an administrative charge with the EEOC. To the extent Xerox has moved for summary judgment, I find that plaintiff has failed to meet his burden of coming forth with sufficient facts to show that a genuine issue of material fact remains for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

tiffs because all plaintiffs in a class action are similarly situated and have identical claims. *See Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 494 (5th Cir. 1968) (Title VII case). In the class action context, because all plaintiffs are similarly situated, notice to the EEOC and to a defendant of one plaintiff's claim serves as notice of the claims of all. As is evident from the District Court's decision in the class action to *decertify* the class, former Xerox employees terminated via the IRIF and VRIF programs instituted in the early 1980s were not in fact similarly situated. The District Court in *Lusardi* discussed this:

> Because it appears the members of the proposed class come from different departments, groups, organizations, units and local offices, as well as different subsidiaries of Xerox, performed different jobs at different geographic locations, were the subject of different job actions concerning reductions in the Xerox workforce (including resignations, promotions, terminations for cause, etc.) which occurred at various times as a result of decisions by different supervisors made on a decentralized employee-by-employee basis, plaintiffs are not similarly situated.

Lusardi v. Xerox Corp., 118 F.R.D. 351, 352 (D.N.J. 1987).

The court having found plaintiffs not to be similarly situated in New Jersey for purposes of the class action, it can be presumed that they are not so situated here, when they bring individual suits. Therefore, the rationale that allows non-filing individual litigants to ride on the coattails of those who file timely charges in class actions does not apply.

Plaintiffs argue that this rule elevates form over substance; that is, that, procedural technicalities aside, the EEOC and Xerox have received adequate notice of the

claims involved here, insofar as all the plaintiffs opted into the class action many years ago. Plaintiffs, however, ask the Court to assume too much. Not one of the plaintiffs in these actions has affirmatively shown that either Xerox or the EEOC was aware specifically of his individual claims before he filed either an EEOC charge or the instant individual complaint. As is evident from the *Lusardi* decertification opinion, discovery with respect to the class only covered a "sample group" of 51 employees; no plaintiff here has offered proof that he or she was a member of that group. While Xerox might have had these plaintiffs' name on a list, this does not necessarily amount to the notice contemplated by ADEA.

Today's result might differ if plaintiffs had opted in to the class action *before* their 300-day limitations periods had expired. In that event, I would have to decide whether their opting-in had the effect of tolling that period, and if so, for how long. But the facts are the facts. For what surely is a variety of reasons, these plaintiffs decided not to file administrative charges within 300 days of their terminations or bring individual lawsuits until after the class action terminated. On the day that these plaintiffs received notice of the opportunity to join the class action, they had each long since relinquished their rights to file charges with the EEOC and commence their own individual ADEA action in federal court. When the notice concerning the pending class action arrived in the mail, plaintiffs, with little risk and much to gain determined to "opt in" and essentially enjoy the benefits of a "free ride" in that litigation.

My decision today in no way disadvantages plaintiffs. Plaintiffs are in no worse a position than that they occupied the day before opting in to the class action. At that time, their circumstances were such that they were barred from bringing individual ADEA claims. At that time, their only remedy was to opt in to a proper ADEA class action filed by someone else. When that action ter-

minated, their rights as class members terminated as well.

B. Aleszczyk's Retaliation and Veteran's Claims

1. Retaliation

The parties do not dispute that, with respect to plaintiff Aleszczyk's claim of wrongful retaliation in June 1984, he filed a timely charge with the EEOC. Xerox makes its motion, however, on the ground that the statute of limitations regarding the time in which a plaintiff must file his civil complaint has run.

The statute of limitations with respect to ADEA claims is imposed in this instance by 29 U.S.C. § 626(e), which in turn, incorporates the provisions of §§ 255 and 259 of that title. Section 255(a) requires that action such as the one at bar be brought within two years after the cause of action accrues, or within three years in the case of willful violations. Moreover, Section 626(e)(2) of Title 29 U.S.C. provides for an additional extension of up to one year while the EEOC is attempting reconciliation.

Defendant maintains that, giving plaintiff the benefit of all doubts, he would have had four years within which to file his civil complaint. Since the alleged retaliation occurred in June of 1984, Xerox asserts that plaintiff's June 1989 complaint is time barred.

Plaintiff may not avail himself of the tolling of this limitations period allowed by the notice of decertification in the *Lusardi* action. The conditional certification of a class in that suit covered only claims accruing for a period of time before May 31, 1983. Therefore, to toll the limitations period as it relates to this claim is wholly illogical.

Plaintiff argues, however, that the Age Discrimination Claims Assistance Act of 1988, Pub. L. 100-283, 102

Stat. 78, (ADCAA) adds a 540-day "window" period, commencing April 7, 1988, during which he may file his retaliation claim. Congress passed ADCAA to redress the effects of mismanagement by the EEOC of age-based discrimination claims. *See Turgeon v. Rush-Presbyterian-St. Luke's Medical Center*, 1989 U.S. Dist. LEXIS 14856 (N.D. Ill. 1989).

ADCAA enumerates several conditions which must be met before a claimant can receive the benefit of the Act's tolling provisions.[3] The Court finds all such conditions to have been met in this case.

Defendant argues that plaintiff should not reap the benefits of the tolling provisions in ADCAA because his charge is no longer pending with the EEOC. That is, defendant asserts that since the EEOC, on June 4, 1986,

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[3] The Act provides in relevant part:

SEC. 3. EXTENSION OF STATUTE OF LIMITATIONS.

Notwithstanding section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626[e]), a civil action may be brought under section 7 of such Act by the Commission or an aggrieved person, during the 540-day period beginning on the date of enactment of this Act if—

(1) with respect to the alleged unlawful practice on which the claim in such civil action is based, a charge was timely filed under such Act with the Commission after December 31, 1983,

(2) the Commission did not, within the applicable period set forth in section 7(e) either—

(A) eliminate such alleged unlawful practice by informal methods of conciliation, conference, and persuasion, or

(b) notify such person, in writing, of the disposition of such charge and of the right of such person to bring a civil action on such claim,

(3) the statute of limitations applicable under such section 7(e) to such claim ran before the date of enactment of this Act, and

(4) a civil action on such claim was not brought by the Commission or such person before the running of the statute of limitations.

informed plaintiff's attorneys by letter that the agency intended to discontinue action on the plaintiff's claim due to his having filed suit, the tolling provisions do not apply by virtue of § 3(2)(b) of the Act. *See*, n.3, *supra*.

Defendant, however, misinterprets ADCAA. Section 3(2)(b) of the Act permits tolling if the Commission fails to notify a claimant of the disposition of his charge or eliminate the unlawful practice "within the applicable period set forth in section 7(e) [29 U.S.C. § 626(e)]."

Because § 626(e) makes reference to more than one time period, this language of ADCAA is somewhat unclear. Section 626(e)(1) incorporates the provision of the Portal-to-Portal Act of 1947, codified at 29 U.S.C. §§ 255 and 259, in setting forth the basic two-year statute of limitations applicable to the filing of civil complaints under ADEA. In subsection (2) of § 626(e), however, the statute provides for a tolling of the statute of limitations for the period during which the EEOC attempts conciliation, which period in no event is to exceed one year.

A reasonable reading of ADCAA would indicate that it is this latter, one-year period to which § 3(2)(b) refers. *See EEOC v. Puerto Rico Job Corps.*, 1990 WL 2427 (D.P.R. 1990). As is admitted by Xerox, the EEOC did not send a letter to plaintiff regarding disposition of his charge until 1986, nearly two years after he had filed that charge. Therefore, § 3(2)(b) of ADCAA does not bar application of the tolling provisions to plaintiff's claim. The EEOC did not, within one year of the filing of the charge, notify plaintiff of the disposition of his claim. In sum, plaintiff's claim does receive the benefit of ADCAA's tolling provisions, and, since the complaint was filed within the 540-day "window" period, defendant's motion to dismiss on statute of limitations grounds is denied.

2. Veteran Status

Aleszczyk also alleges that Xerox terminated him unlawfully on the basis of his status as a disabled veteran, in violation of VEVRAA, 38 U.S.C. § 2012, and the regulations promulgated thereunder, 41 C.F.R. 60-250.4 *et seq.* Plaintiff apparently suffers from tinnitus, a hearing disorder.

No court yet has held that a private right of action exists under VEVRAA. In fact, courts have held that individuals possess no such right, and that only the Department of Labor may sue under the statute. *See Barron v. Nightingale Roofing, Inc.*, 842 F.2d 20 (1st Cir. 1988); *De Leon Cruz v. Loubriel*, 539 F.Supp. 250 (D.P.R. 1982). The court in *Barron* observed that to allow a private right of action might well frustrate the orderly enforcement process set up by the regulations, which detail a specific sequence of procedures to be followed by the Department of Labor in handling veterans' complaints.

Moreover, those courts that have equivocated on the issue of the existence of a private right of action have found that complainants must first file a complaint with the Department of Labor before bringing suit. 41 C.F.R. 60-2250.26(a) provides, in relevant part that "[a]ny applicant for employment . . . or any employee . . . may . . . file a written complaint with the Veterans' Employment Service of the Department of Labor . . . alleging a violation of the Act or the regulations. . . . Such complaint is to be filed not later than 180 days from the date of the alleged violation." Plaintiff has filed no such complaint.

Although the word "may" suggests that administrative filing is permissive, courts construing this language have found exhaustion of administrative remedies to be a mandatory prerequisite to suit. *See De Leon Cruz*, 539 F.Supp. at 251; *Marin v. New York State Department of Labor*, 512 F.Supp. 353 (S.D.N.Y. 1981).

Therefore, because plaintiff cannot show that a private right of action exists, and because he has not filed a complaint with the Department of Labor, I find this cause of action to be without merit as a matter of law.

C. Braun's ADEA and Rehabilitation Act Claims

1. ADEA

Plaintiff Braun, in addition to joining the other plaintiffs' argument relating to opting in to the *Lusardi* class action, maintains that he attempted timely to file a charge with the EEOC alleging age discrimination, but was frustrated in his efforts by the agency itself. In an affidavit sworn to on December 26, 1989, Braun states that on May 10, 1983, he contacted the EEOC and was promised that appropriate materials necessary for filing a charge would be sent to him. He attests that none had been sent as of the date he consented to join the class action.

Braun has presented this court with no evidence of his encounter with the EEOC other than his own affidavit. In any event, the burden is on the claimant to file a claim. This requirement is not excused by the facts here.

2. Rehabilitation Act claim

Plaintiff Braun alleges that in discriminating against him on the basis of his medical handicap, Xerox has violated the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794. The Act provides in relevant part:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity receiving Federal financial assistance* (emphasis added).

Defendant argues, and I agree, that plaintiff has failed to allege that Xerox is a "program or activity receiving

Federal financial assistance" under the Act. Plaintiff apparently relies on Xerox' status as a recipient of various U.S. Army procurement contracts to support his contention that Xerox falls within the ambit of this section.

Federal regulations promulgated pursuant to the Act, as well as caselaw interpreting it, specifically exclude mere receipt of procurement contracts from the definition of "Federal financial assistance." 45 C.F.R. 84.3(h) defines this term to be "any grant, loan contract (*other* than a procurement contract)" making federal funds available to recipients (emphasis added). *See also Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981), citing *Rogers v. Frito-Lay, Inc.*, 433 F.Supp. 200, 204 (N.D. Tex. 1977).

Even if I were to hold that mere allegations of receipt of procurement contracts bring Xerox within the proscriptions of the Act, the Fifth Circuit in the oft-cited *Brown* decision held that a plaintiff must always allege more than that the overall entity discriminating against him receives federal financial assistance. The court wrote:

> it is not sufficient, for purposes of bringing a discrimination claim under section [794], simply to show that some aspect of the relevant overall entity or enterprise receives or has received some sort of input from the federal fisc. A private plaintiff in a section [794] case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

650 F.2d at 759.

Plaintiff's allegations with respect to Xerox rise nowhere near the level of specificity required by the regulations and cases. Therefore, defendant's motion to dismiss this claim is granted.

D. State Law Claim

Having dismissed the federal claims for relief brought by plaintiff Braun, I decline to exercise pendent jurisdiction over state law claims.

CONCLUSION

For the reasons stated above, defendant Xerox' motion to dismiss plaintiffs' claims is GRANTED in its entirety as to all plaintiffs in these actions except that with respect to plaintiff Aleszczyk's retaliation claim, such motion is DENIED. Plaintiff Braun's and Aleszczyk's cross motions for summary judgment are DENIED.

IT IS SO ORDERED.

/s/ David G. Larimer
DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
February 14, 1990